Supreme Court, U.S.
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No. ____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1994

NORTH GEORGIA ELECTRIC MEMBERSHIP CORPORATION,

Petitioner,

v.

CITY OF CALHOUN, GEORGIA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF GEORGIA

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does the City of Calhoun, Georgia violate Section 13 of the Tennessee Valley Authority Act of 1933 ("TVA Act"), as amended, 16 U.S.C. § 831l -- which provides that certain gross proceeds from the sale of Tennessee Valley Authority ("TVA") electric power be paid to state and local governments "in lieu of taxation" by such governments -- by imposing its own tax of four percent of the gross revenues from TVA power sold or distributed within the city limits?

2. Does a nonprofit distributor of TVA power pursuant to a contract with TVA (through which TVA imposes strict terms, conditions and resale rates) have a "franchise" within the meaning of Section 13 of the TVA Act?

3. Does the contested taxation by the City of Calhoun, Georgia violate Article VI, Paragraph 2 of the Constitution of the United States (i.e., the Supremacy Clause), and the doctrine of intergovernmental tax immunity, insofar as the ordinance is applied to receipts from the authorized sale and distribution of TVA electric power within the City of Calhoun?

LIST OF PARTIES

The parties to the proceeding before the Supreme Court of Georgia were the petitioner, North Georgia Electric Membership Corporation, and the respondent, City of Calhoun (Georgia).

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

NORTH GEORGIA ELECTRIC MEMBERSHIP CORPORATION,

Petitioner,

v.

CITY OF CALHOUN, GEORGIA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF GEORGIA

Petitioner, North Georgia Electric Membership Corporation ("North Georgia"), hereby petitions the Court for a writ of certiorari to review the judgment of the Supreme Court of Georgia in this case.

OPINIONS BELOW

The opinion of the Supreme Court of Georgia (App., infra, 1a-11a) is reported at 264 Ga. 769 (1994). The opinion of the Superior Court of Gordon County, Georgia, in this case (App., infra, 12a-45a) is unreported.

JURISDICTION

The judgment of the Supreme Court of Georgia sought to be reviewed was entered on November 28, 1994. Reconsideration or rehearing was denied in an order dated December 20, 1994. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS, STATUTES AND ORDINANCES INVOLVED

Section 13 of the Tennessee Valley Authority Act of 1933, as amended, 16 U.S.C. § 831l provides, in relevant part:

> In order to render financial assistance to those States and local governments in which the power operations of the Corporation are carried on and in which the Corporation has acquired properties previously subject to State and local taxation, the board is authorized and directed to pay to said States, and the counties therein, for each fiscal year, beginning July 1, 1940, the following percentages of the gross proceeds derived from the sale of power by the Corporation for the preceding fiscal year as hereinafter provided, together with such additional amounts as may be payable pursuant to the provisions hereinafter set forth, said payments to

> constitute a charge against the power operations of the Corporation: For the fiscal year (beginning July 1) 1940, 10 per centum; 1941, 9 per centum; 1942, 8 per centum; 1943, 7 1/2 per centum; 1944, 7 per centum; 1945, 6 1/2 per centum; 1946, 6 per centum; 1947, 5 1/2 per centum; 1948 and each fiscal year thereafter, 5 per centum. "Gross proceeds", as used in this section, is defined as the total gross proceeds derived by the Corporation from the sale of power for the preceding fiscal year, excluding power used by the Corporation or sold or delivered to any other department or agency of the Government of the United States for any purpose other than the sale thereof. The payments herein authorized are in lieu of taxation, and the Corporation, its property, franchises and income, are expressly exempted from taxation in any manner or form by any State, county, municipality, or any subdivision or district thereof.

The references to "the Corporation" appearing in a portion of 16 U.S.C. § 831l quoted above refer to the Tennessee Valley Authority. 16 U.S.C. § 831. For the convenience of the Court,

16 U.S.C. § 8311 is set forth in its entirety in the appendix hereto (App. at 46-49a).

Article VI, Clause 2 of the Constitution of the United States, the Supremacy Clause, provides as follows:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

Ordinance No. 493 of the City of Calhoun (Georgia), adopted on October 26, 1992, among other things, added Article V, Sec. 12-170, to the Code of Ordinances, City of Calhoun, Georgia. In pertinent part, Ordinance No. 493 (the entirety of which is reprinted in the Appendix at 54a-57a), provides in relevant part:

> Each secondary supplier (including specifically Electric Membership Corporations whether or not operated for profit), within the meaning of O.C.G.A. § 46-3-1 et seq., distributing and selling

electric power within the city which is not otherwise paying a franchise fee pursuant to a franchise agreement, and whether or not said secondary electric supplier has, operates and maintains offices within the city shall pay a gross receipts tax at the rate of four (4) per cent on any and all gross revenue derived from distribution and sale of electric power to their customers, members, or purchasers within the city, according to the verified statement of said gross revenues which shall be submitted by said secondary electric supplier at the time said taxes are paid.

STATEMENT OF THE CASE

The City of Calhoun, Georgia ("City" or "Calhoun"), has imposed a four percent gross receipts tax on Tennessee Valley Authority ("TVA") electric power distributed within the city limits by North Georgia Electric Membership Corporation ("North Georgia"). However, Section 13 of the Tennessee Valley Authority Act of 1933 ("TVA Act" or "Act"), as amended, provides that, in order to render financial assistance to state and local governments for operations and property previously subject to state and local taxation, a statutorily-defined percentage of the

gross receipts from the sale of TVA power shall be paid to affected states and local governments "in lieu of taxation." 16 U.S.C. § 831l. Section 13 of the Act further states that TVA, "its property, franchises and income," are "expressly exempted" from taxation "in any manner or form" by any state, county or municipality. Id.

Notwithstanding the provisions of Section 13, and contrary to the interpretation of Section 13 supplied by a number of federal district court decisions, the Supreme Court of Georgia has upheld the legality of Calhoun's four percent gross receipts tax. In further conflict with federal court authority, the Supreme Court of Georgia based its holding on a conclusion that North Georgia's contract with TVA did not entitle North Georgia to claim the benefit of the tax exemption Congress accorded to "franchises" of TVA under Section 13 of the Act.

A. STATUTORY FRAMEWORK

1. The TVA Act And The Use Of Nonprofit Distributors Of TVA's Surplus Power To Fulfill The Purposes Of The Act

Congress passed the TVA Act more than 60 years ago. The express purposes of the Act included, among other things, the delivery of electric power to farms and small towns that, at the time of the Act's enactment, were not otherwise supplied with electricity at reasonable

rates. See 16 U.S.C. 831i. Another objective of the Act was "to promote and encourage the fullest possible uses of electric light power on farms" within the Tennessee Valley. Id.

To achieve these and the Act's other ends, Congress created the TVA, and authorized that body to sell surplus power to states or local governments, and to corporations, partnerships or individuals, subject to the policies set forth in the TVA Act. In order to keep the rates low for ultimate consumers of the electricity, Congress specified that TVA was to give preference in the sale of surplus power to governmental subdivisions and "cooperative organizations of citizens or farmers, not organized or doing business for profit, but primarily for the purpose of supplying electricity to its own . . . members." Id.

Pursuant to authority granted in the Act, and to further the Congressional aim of keeping rates low, TVA developed standard form contracts to authorize municipalities and other nonprofit cooperative organizations to acquire TVA's surplus power at wholesale prices, and to sell the power to the ultimate retail consumers. As authorized by the Act, TVA has included in the form contracts numerous specific terms and conditions that TVA has deemed necessary or desirable for carrying out the purposes of the TVA Act. Id.

Under the terms and conditions of the standard contract with TVA, authorized

distributors of TVA's surplus power surrender their autonomy to the TVA in several critical respects. Among other things, the distributors become bound to operate on a strictly nonprofit basis, to acquire all of the power they distribute from TVA, to resell the power at rates established by TVA, and to otherwise make their operations subject to the exacting scrutiny and control of TVA.[1]

2. The Tax Exemption Provided By Section 13 Of The TVA Act

In 1940, Congress recognized that the federal power operations commenced under the TVA Act had adversely affected the ability of the states and local governments to obtain tax revenues. Accordingly, Congress amended Section 13 of the Act to provide financial assistance -- in the form of payments "in lieu of taxation" -- "to those States and local governments in which the power operations of [TVA] are carried on and in which [TVA] has acquired properties previously subject to State and local taxation . . . ." 16 U.S.C. § 831l. At the same time, Congress made clear in Section 13 that TVA, "its property, franchises and income, are expressly exempted from taxation in any manner or form by any State, county, municipality,

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[1] TVA does not sell power wholesale to a power distributor except under the terms of a contract containing the terms included in its standard form contract.

or any subdivision or district thereof." Id.

The amounts of the payments in lieu of taxes are derived pursuant to a two-pronged formula that takes account of TVA's gross proceeds from sales of TVA-generated power within the state, as well as the value of property owned by TVA within the affected state. In particular, the Act provides:

> The payment for each fiscal year shall be apportioned among said States in the following manner: one-half of said payment shall be apportioned by paying to each State the percentage thereof which the gross proceeds of the power sales by [TVA] within said State during the preceding fiscal year bears to the total gross proceeds from all power sales by [TVA] during the preceding fiscal year; the remaining one-half of said payment shall be apportioned by paying to each State the percentage thereof which the book value of the power property held by [TVA] within said State at the end of the preceding fiscal year bears to the total book value of all such property held by [TVA] on the same date.

16 U.S.C. § 831l.[2]

B. STATEMENT OF FACTS

1. North Georgia And Its Integral Role In Federal Power Operations

North Georgia's existence can be traced to 1936, when eight individuals representing farmers and farm organizations entered into a contract with TVA under which TVA would build for North Georgia's eventual ownership the power lines necessary to begin rural electric service in northwestern Georgia. These individuals then formed North Georgia, the first electric membership corporation in Georgia. On June 15, 1936, North Georgia executed a 20-year wholesale power contract with TVA, establishing North Georgia as a TVA power distributor.

Throughout its existence, North Georgia has entered into a series of standard form wholesale power contracts with TVA, the most recent having been executed on June 10, 1976 (the "Contract"). The Contract, like its predecessors, contains detailed covenants and conditions regulating how North Georgia is to carry out its role in the

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[2] Except for certain payments made directly to counties in which power property and reservoir lands are located, the in lieu of tax payments are made to the states, which themselves determine how the in lieu of tax payments are apportioned within such states.

TVA distributor power operations. The Contract states that it is subject to the provisions of the TVA Act. The Contract provides, among other things, that North Georgia must acquire all the power it distributes from TVA, forbids North Georgia from making a profit, and provides for TVA control of North Georgia's operations by TVA's setting of wholesale and retail rates.

TVA's control over, and partnership with, North Georgia is exhibited in other ways. Among other things, TVA auditors review North Georgia's system of accounts; TVA provides engineering and environmental assistance and support; TVA works closely with North Georgia on marketing and industrial development matters; TVA wholesale power rates are reviewed periodically with North Georgia and other TVA distributors; North Georgia must obtain TVA's written approval in order to make any changes in its retail rate levels; TVA audits North Georgia's financial performance for compliance with contract requirements that rates be as low as possible; and TVA reviews North Georgia's use of revenues for contract compliance.[3]

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[3] In addition, a party who desires to receive electric service from North Georgia must apply for membership in North Georgia. In so doing, the prospective member must agree to abide by the rules and regulations which are stipulated and

(footnote continued on next page)

In short, in all material respects, North Georgia's contractual relationship with TVA has made North Georgia (like all other authorized governmental and cooperative distributors of TVA surplus power) a vital and crucial component of the federal power operations contemplated in the TVA Act.[4] It is the revenues derived from North Georgia's integral participation in these federal power operations -- revenues which do not and cannot legally include any profit margin for North Georgia -- which North Georgia contends are exempt from State and local taxation as a consequence of 16 U.S.C. § 831l, the doctrine of intergovernmental tax immunity, and the Supremacy Clause of the United States Constitution.

(footnote continued from previous page)

controlled by TVA. Thus, the federally-established controls contained in the provisions of the Contract extend through North Georgia to its members.

[4] Indeed, the Supreme Court of Georgia recognized that "the sale of surplus [TVA] power through both public and private distributors" such as North Georgia represents an "integral part" of the effort to meet the objectives of the TVA Act. App. at 4a.

2. The City Of Calhoun's Gross Receipts Business Tax

On October 26, 1992, having failed in efforts to compel North Georgia to pay four percent of its gross revenues to the City as a franchise fee,[5] Calhoun adopted Ordinance No. 493 (the "Tax Ordinance"), which purports to impose a gross receipts "business tax" upon "[e]ach secondary electric supplier (including specifically Electric Membership Corporations whether or not operated for profit) . . . distributing and selling electric power within the city which is not otherwise paying a franchise fee pursuant to a franchise agreement . . . ." App. at 54a-55a. North Georgia and the Georgia Power Company are the only two "secondary electric supplier[s]" within the City.[6] Unlike North Georgia, however, Georgia Power Company has voluntarily entered into a franchise agreement with the City and pays franchise fees thereunder. Thus, for all practical purposes, the business tax imposed by the Tax Ordinance, has been imposed on North

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[5] See City of Calhoun v. North Georgia Electric Membership Corp., 264 Ga. 205 (1994).

[6] The City itself distributes and sells electric power within its own limits, and is the "primary supplier" within its limits as defined in O.C.G.A. § 46-3-3(7), but imposes no gross receipts tax on its own revenue.

Georgia alone.[7] North Georgia, however, refused to pay the tax imposed by the Tax Ordinance, believing that its revenues are exempt from state and local taxation pursuant to Section 13 of the TVA Act.

C. PROCEEDINGS BELOW

To confirm its exemption from Calhoun's Tax Ordinance, North Georgia filed this action for declaratory and injunctive relief in the Superior Court of Gordon County, Georgia. North Georgia moved for summary judgment, arguing, among other things, that Calhoun's ordinance violates Section 13 of the TVA Act, and that applying the ordinance to North Georgia would violate the Supremacy Clause of the Constitution of the United States. The Superior Court rejected these arguments and granted summary judgment to the City on January 12, 1994.

North Georgia appealed the Superior Court's decision to the Supreme Court of Georgia, and reiterated its arguments that Calhoun's attempts to tax North Georgia flouted the terms of Section 13 of the TVA Act and violated the Supremacy Clause. The Supreme Court of Georgia,

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[7] North Georgia has paid, and continues to pay, State, county and city ad valorem taxes levied on its property located within Calhoun. The tax imposed in the Tax Ordinance is levied only on revenues North Georgia derives solely as a result of its nonprofit operations as an authorized distributor of federal power.

however, sustained the Superior Court's rulings on these federal issues and otherwise upheld the validity of the City's ordinance as applied to North Georgia.

For the reasons explained in detail below, North Georgia submits that the judgment of the Supreme Court of Georgia misinterprets a central provision of the TVA Act; conflicts with the decisions of federal courts concerning the same issue; violates the Supremacy Clause of the Constitution of the United States; and conflicts with the doctrine of inter-governmental tax immunity. If allowed to stand, the Georgia Supreme Court's decision threatens the uniform application of important provisions of federal law, and undermines TVA's ability to fulfill the Congressional mandate of making electric power available at the lowest possible rates through nonprofit cooperative organizations such as North Georgia. Indeed, if states and other local governments are allowed to tax revenues such as those derived by North Georgia's operations in Calhoun, the necessary effect will be an increase in the rates paid by the ultimate consumers of electricity, or TVA's abandonment in jurisdictions such as Calhoun of the use of nonprofit cooperative organizations as vehicles to distribute TVA surplus power. Either of these effects would undercut achievement of Congress' stated goals in enacting the TVA Act.

REASONS FOR GRANTING THE PETITION

1. The Supreme Court Of Georgia's Holding Conflicts With The Decisions Of Several Federal Courts Concerning The Same Issues, And Is In Error

The crux of the Supreme Court of Georgia's decision in this case was that North Georgia is not one of TVA's "franchises" within the meaning of the tax exemption established by Section 13 of the TVA Act. App. at 5a. This holding is diametrically opposed to the only decisions issued by federal courts on this question in Cullman Electric Cooperative v. City of Cullman, No. 91-N-665-NE (N.D. Ala. Aug. 30, 1991) (reprinted in App. at 70a-82a); Town of Courtland v. Town of North Courtland, No. 90-L-1346-NE (N.D. Ala. Dec. 28, 1990) (reprinted in App. at 83a-84a); and City of Sheffield v. Town of Cherokee, No. 89-AR-5073-NW (N.D. Ala. Oct. 12, 1989) (reprinted in App. at 58a-69a). These uniformly-decided federal cases hold that the distribution of TVA power by nonprofit entities which hold contracts with TVA constitute "franchises" within the meaning of Section 13, and that municipalities such as Calhoun cannot lawfully tax the revenues obtained by such entities when they distribute or sell TVA power pursuant to a contract with TVA.

In Sheffield, the first and seminal case on this issue, the Town of Cherokee, Alabama, levied a gross receipts privilege or license tax on power

companies or other public utilities that did business within Cherokee. Among such entities was the City of Sheffield, Alabama, which sold within Cherokee electric power that Sheffield had acquired pursuant to a contract with TVA that made Sheffield an authorized distributor of TVA surplus power. Pursuant to its contract with TVA, the City of Sheffield (like North Georgia) was required to resell the power it purchased from TVA at rates established by TVA (App. at 58-59a); was precluded from making any profit on the resale of TVA power (id. at 59a); and was otherwise subject to a host of controls by TVA (id. at 59-61a).

Consistent with North Georgia's argument in this case, the City of Sheffield argued that it was exempt from Cherokee's tax on its revenues by virtue of Section 13 of the TVA Act. The United States District Court for the Northern District of Alabama recognized, therefore, that the validity of the tax depended "upon whether the contract between TVA and Sheffield constitutes a 'franchise' for purposes of [16 U.S.C.] § 831l." App. at 66a. If so, then Cherokee's tax must be invalidated, and Cherokee must be relegated to obtaining its revenue for TVA power sales solely from the "tax equivalent payments" that TVA makes "to governments in whose jurisdiction TVA carries on its power operations" pursuant to Section 13 of the Act. Id.

Based "on long standing usage of the term" franchise, as well as "the purposes of the TVA Act," the Sheffield court found "that Sheffield received a franchise from TVA and that revenue from that franchise is exempt from Cherokee's tax." Id. at 67a. With respect to the historic understanding of the phrase "franchise," the court explained:

> Long before the term became used in distributorship relationships, a "franchise" was known as a special privilege conferred upon individuals or corporations by governmental authority to do something that could not be done of common right. Bank of Augusta v. Earle, 38 U.S. 519 (1838). Here, TVA, an agency of the United States (see 16 U.S.C. § 831 et seq.), conferred upon Sheffield the ability to receive TVA's excess electricity at a wholesale rate and to distribute it to the benefit of consumers.

Id.

More importantly, the Sheffield court also firmly grounded its holding in the "purpose of the TVA Act and its provision of tax-equivalent payments . . . ." Id. In the court's words:

> Congress intended TVA to distribute power to consumers at the lowest possible cost to

> the consumer. See 16 U.S.C. § 831i (1935) (expressing a Congressional preference for distribution of excess electricity to organizations not engaged in distribution for profit). . . . To allow Cherokee to tax the sale of the TVA-supplied power would thwart Congress' purpose in allowing TVA to sell its excess electricity to municipalities and in providing consumers with economical sources of power. . . . Other municipalities and Colbert County could enact similar taxes and, if the taxes are burdensome, effectively tax the operation out of business, leaving Colbert County without an economical source of electricity.

App. at 67-68a.

Two years after Sheffield was decided, the same result was reached in Cullman Electric Cooperative, supra, except that the nonprofit distributor of TVA power in the latter case was (like North Georgia) an electric cooperative, not a municipality. In Cullman, the City of Cullman, Alabama, itself a distributor of TVA power, had also sought to tax the cooperative's gross receipts within the city's jurisdiction, but the cooperative claimed the taxes violated Section 13 of the Act and the Supremacy Clause. The court granted the cooperative's motion for summary judgment, agreeing with the

holding in Sheffield that "non-profit distributors of TVA power, such as Cullman Electric, are TVA franchises and, therefore, exempt from local taxation pursuant to [16 U.S.C. §] 831l." App. at 75a.[8]

Yet another federal judge declared invalid a town's attempt to tax the nonprofit operations of an authorized TVA power distributor in Town of Courtland. The court in that case noted that the distributor "is contractually bound to operate its facility at a zero profit

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[8] The Cullman court's ruling in favor of a non-municipal electric cooperative, based on precisely the same rationale as was advanced in Sheffield, belies the Superior Court's determination in this case that Sheffield is distinguishable because the distributor in Sheffield was a municipality. See App. at 37a. Although the Supreme Court of Georgia cited Sheffield, it did not discuss the opinion or the Sheffield court's reasoning; nor did it predicate its decision on the fact that North Georgia is a nonprofit cooperative, not a municipality.

The Superior Court also incorrectly concluded that Cullman is explained by the taxing authority's failure to file a brief before the case was decided. See App. at 39a. In fact, the City of Cullman's brief was delayed only until a "draft" of the court's "opinion was sub-stantially complete," and the court "read the brief" but concluded that it did not require a different result. App. at 74a n.1 (emphasis added).

margin," and was "persuaded by the rationale" of the Sheffield decision.

The Georgia Supreme Court responded to the foregoing authority by essentially ignoring it. In a footnote, the Georgia Supreme Court cited the decisions in Sheffield, Cullman, and Town of Courtland, but it never discussed, much less distinguished, those cases.[9] Instead, the Supreme Court of Georgia purported to follow a "framework" established by the United States Court of Appeals for the Sixth Circuit in City of Tullahoma v. Coffee County, 328 F. 2d 683 (6th Cir. 1964), cert. denied, 379 U.S. 989 (1965).

The first problem with the Supreme Court of Georgia's reliance upon City of Tullahoma is that that case did not deal with the issue presented here. The issue

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[9] In contrast, the United States Court of Appeals for the Eleventh Circuit recognized the merit of North Georgia's reliance upon the Sheffield, Courtland, and Cullman decisions in North Georgia Electric Membership Corporation v. City of Calhoun, 989 F.2d 429 (11th Cir. 1993). The Eleventh Circuit noted, without rendering a holding on the issues presented here, that "the courts have long recognized the special partnership between TVA and its distributors," North Georgia, 989 F.2d at 434, that the Sheffield, Courtland, and Cullman decisions "support North Georgia's arguments," id. at 435, and that "Calhoun may have been wrong to tax a TVA distributor." Id. at 433.

in City of Tullahoma was whether federal law mandated how certain "in lieu of tax" payments authorized by Section 13 to be made to municipalities should be distributed by the municipalities. City of Tullahoma, 328 F.2d at 686 et seq. The decision in City of Tullahoma has nothing to do with whether nonprofit cooperative or municipal distributors of TVA power hold "franchises" from TVA and are thus able to claim the benefit of the exemption from state and local taxes established by Section 13 for their activities as part of the federal government's power operations.

In other words, whereas in the City of Tullahoma "the TVA Act did not provide a rule regarding distribution of tax equivalent payments, the Act does provide an answer" to the question whether power operations carried out by authorized nonprofit distributors of TVA power "are exempt from state and local taxation." Sheffield, App. at 65-66a. The answer, derived from the express terms of the Act, is that such operations are exempt from taxation insofar as they hold "franchises" of TVA within the meaning of Section 13 of the Act. Id. at 66a.

On the issue of whether the power distribution contract between TVA and North Georgia is a "franchise" within the meaning of Section 13, the Georgia Supreme Court agreed that the term "franchise" has long "signified a government charter or special privilege conferred on an individual or corporation to do something which it otherwise has no

common right to do." App. at 5a. Rather than take the logical next step of concluding that North Georgia's contract with TVA conferred upon North Georgia a "special privilege" to buy and distribute TVA power, the court attempted to distinguish a franchise from a contract. In particular, the court noted that, "while the Act specifically authorizes the TVA to enter into contracts . . . the Act does not authorize TVA to grant franchises" and does not mention the word "franchise" in any section other than Section 13. Id. Based on this reasoning, the court apparently concluded that the only "franchises" contemplated by Section 13 are franchises that TVA itself acquired by virtue of its own "charter and its powers thereunder." Id.

The court's attempt to diminish North Georgia's contract with TVA -- and its conclusion that "the Act does not authorize TVA to grant franchises" -- overlooks the well-established proposition that "a franchise is a contract creating property rights." Macon Ambulance Service, Inc. v. Snow Properties, 218 Ga. 262, 265 (1962). See also City of Calhoun, 264 Ga. at 207 ("A franchise fee is payment in consideration of a contract creating property rights.") (emphasis in original).

The Supreme Court of Georgia also confused statements appearing in the legislative history of Section 13 concerning the continued ability of states and local governments to tax property owned by TVA's cooperative

distributors with Congress' intentions with regard to state and local taxation of the distributors' revenues. That is, quite apart from the general unreliability of basing statutory interpretation on statements made in "hearings before congressional committees," App. at 5-6a, it simply does not follow that, by intending to exempt "TVA (i.e., federally owned) property" from state and local property taxes, Congress must have intended to authorize state and local taxation of receipts derived from the distribution of TVA power.[10]

On the contrary, the very terms of Section 13 indicate that Congress intended for state and local governments to obtain their share of such receipts solely through that portion of the yearly payments "in lieu of taxation" that are expressly to be calculated with reference to "the gross proceeds derived from the sale of power by [TVA]" within the

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[10] The court further evidenced its confusion between, on the one hand, taxing property owned by TVA distributors and, on the other, taxing the federal power operations discharged by the distributors under their contracts with TVA, when it referred to a contractual provision that permits North Georgia to use its gross revenues to pay taxes. This provision of the Contract merely permits North Georgia to pay non-exempt taxes, such as ad valorem taxes on property owned by the cooperative, taxes which North Georgia continues to pay.

pertinent state. 16 U.S.C. § 831l. Indeed, in light of the plain terms of Section 13 -- coupled with the Act's overriding goal of keeping rates at the lowest possible level -- Congress could not have intended to allow state and local governments to obtain shares of receipts generated from the sale of TVA power twice, once when the power is transmitted by TVA to the distributor (in the form of the "in lieu of taxation" payments), and again when the power is distributed to the ultimate consumer (in the form of a direct and presumably unrestricted tax on the distributor's receipts).

The Georgia Supreme Court's decision also fails to account for the vital role nonprofit cooperatives such as North Georgia play in fulfilling the congressional intent expressed in the purposes of the TVA Act and in the means which TVA chose to carry out its federal power operations. Indeed, because of their significance, electric cooperatives have been held to be instrumentalities of the United States to meet the objectives of federal law. Alabama Power Company v. Alabama Electric Co-op, Inc., 394 F.2d 672, 677 (5th Cir.), cert. denied, 393 U.S. 1000 (1968); Greensboro Lumber Company v. Georgia Power Company, 643 F. Supp. 1345, 1359-60 n.12 (N.D. Ga. 1986), aff'd, 844 F.2d 1538 (11th Cir. 1988).

With respect to the distribution of TVA's surplus power -- over which

Congress has exclusive control[11] -- Congress has in particular directed that, as its first priority, TVA should seek to sell such power wholesale to certain nonprofit cooperatives such as North Georgia and governmental units, for distribution to the ultimate consumers. Only if sufficient TVA power exists after TVA meets the needs of the nonprofit cooperatives and governmental units may TVA sell power directly to other potential buyers for direct consumption, or to private entities for resale at a profit. See 16 U.S.C. § 831i.

It is through these mechanisms that Congress has sought to achieve the goals of delivering electric power to farms and small towns at reasonable rates. Id. And it is through the strict terms and rate schedules included in TVA's contracts with nonprofit distributors -- terms and conditions imposed pursuant to the authority conferred by Congress (id.) -- that TVA has further acted to ensure achievement of the objective of delivering electric power "at the lowest possible rates and in such a manner as to encourage increased domestic and rural use of electricity." 16 U.S.C. § 831j.

The Georgia Supreme Court also failed to appreciate that Section 13 of the TVA Act is, in essence, an express reaffirmance of the doctrine of

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[11] Mobil Oil Corporation v. TVA, 387 F. Supp. 498, 509 n.22 (N.D. Ala. 1974).

intergovernmental tax immunity, which, as applied to the actions and operations of the federal government, has as its basis the supremacy clause of the United States Constitution. See McCulloch v. Maryland, 4 Wheat. 316, 427 (U.S. 1819). Although the doctrine of intergovernmental immunity has both expanded and contracted in the years since Chief Justice Marshall first authored the McCulloch opinion, the modern doctrine had recently been fashioned when Congress amended Section 13 of the TVA Act in 1940. See Davis v. Michigan Department of Treasury, 489 U.S. 803, 811 (1989); Graves v. New York ex rel. O'Keefe, 306 U.S. 466 (1939). Under the modern doctrine, a state or local tax cannot be imposed upon a function or operation of the federal government unless the federal government consents. See Davis, 489 U.S. at 814; Graves, 306 U.S. at 481; McCulloch, 4 Wheat. at 435-436.

Section 13 of the Act echoes this established principle. Section 13 provides that, in recognition of the fact that state and local governments cannot tax TVA power operations, certain payments in lieu of taxes will be paid to the affected states. See 16 U.S.C. § 831l. Thus, the federal government has consented only to those payments and, to emphasize the limitation on that consent, Section 13 also makes clear that TVA, "its property, franchises and income, are expressly exempted from taxation in any manner or form by any State, county, municipality, or any subdivision or district thereof." 16 U.S.C. § 831l.

Whatever the merits of the reasoning employed by the Supreme Court of Georgia in this case, the fact remains that the decision directly contradicts the only decisions rendered by federal courts on the same issues. For the reasons stated below, a conflict of authority regarding such important issues should be resolved by this Court.

2. The Supreme Court Of Georgia's Holding Decided An Important Question Of Federal Law Which Has Not Been, But Should Be, Decided By This Court

In deciding this case, the Georgia Supreme Court made no mention of a crucial policy concern upon which the Sheffield court based its decision, namely, the threat state and local taxation of nonprofit TVA power distributors' revenues poses to the attainment of the Congressional goal of making electricity available at the lowest feasible rates. Borrowing from the Sheffield court, allowing municipalities and other local governments "to tax the sale of TVA supplied power would thwart Congress' purpose in allowing TVA to sell its excess electricity to municipalities [and other nonprofit distributors] and in providing consumers with economical sources of power." App. at 67-68a. There is a real potential for such taxes to become "burdensome, effectively taxing the operation[s] out of existence," and leaving the ultimate consumers "without an economical source of electricity." Id.

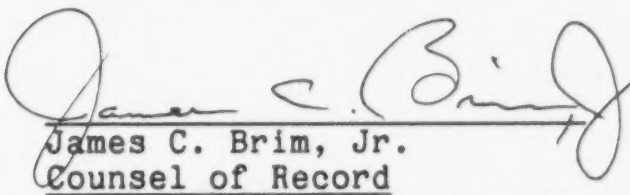
The Superior Court did acknowledge that this threat is "a rock bottom concern" because "the power to tax is the power to destroy." App. at 40a. Yet, that court's response to the concern -- not to mention the Supreme Court of Georgia's neglect of the issue entirely -- fails to correspond to the seriousness of the threat. The court's response was simply to state that "Congress could easily amend 16 U.S.C § 831 and state that the cooperatives are not to be taxed . . . ." Id. From the perspective of North Georgia and the federal district courts, of course, Congress has done just that in Section 13.

Other state and local governments will no doubt be emboldened by the City of Calhoun's actions and the conflicting decisions regarding the legality of such taxes. There is, however, no need to await Congressional action to resolve the conflict and thereby to squarely address the threats to the attainment of the Act's purposes. To delay resolution of the issue will only serve to increase the pressure on nonprofit TVA power distributors either (a) to pass their increased costs to the consumers in the form of higher rates, or (b) to curtail or abandon their operations, thereby diminishing TVA's ability to adhere to Congress' preference for delivering power at the lowest possible rates through TVA's network of nonprofit distributors.

CONCLUSION

The Petition for Writ of Certiorari should be granted.

Respectfully submitted,



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IN THE SUPREME COURT OF GEORGIA

NORTH GEORGIA ELECTRIC MEMBERSHIP CORPORATION,	)	Case No. S94A1009
Plaintiff,	)	
v.	)	DECIDED Nov. 28, 1994
CITY OF CALHOUN, A Municipal Corporation,	)	RECONSIDERATION DENIED Dec. 20, 1994
Defendant.	)	

HUNSTEIN, Justice:

This is the second appearance of these parties before this Court. City of Calhoun v. North Georgia EMC, 264 Ga. 205 (443 SE2d 469) (1994) held that the City of Calhoun ("City") would not collect a franchise fee of four percent of the gross sales by North Georgia Electric Membership Corporation ("NGEMC") to its customers within the city limits pursuant to an ordinance (Ordinance No. 361) authorizing the grant of a street franchise to NGEMC in exchange for its agreement to pay the franchise fee because there existed no enforceable contract between the City and NGEMC. In response to NGEMC's rejection of Ordinance No. 361 and its refusal to pay the franchise fee, and pending the litigation resulting in City of Calhoun, id., the City adopted another ordinance, Ordinance No. 493. This ordinance

imposed a four percent gross receipts tax on the revenues of

> "each secondary supplier (including specifically Electric Membership Corporation whether or not operated for profit), within the meaning of OCGA § 46-3-1 et seq., distributing and selling electric power within the City which is not otherwise paying a franchise fee pursuant to a franchise agreement. . . ."

NGEMC refused the City's demand to pay the business tax and filed the present action seeking declaratory and injunctive relief. The Gordon County Superior Court entered summary judgment in favor of the City, declared the ordinance valid and ordered NGEMC to remit the accrued tax payments to the City. NGEMC now appeals from that order contending that as a franchise of the Tennessee Valley Authority ("TVA") it is exempt from the payment of the business tax and that the ordinance is unconstitutional. We disagree as to both contentions.

1. NGEMC asserts that it is a "franchise" of the TVA and is thus exempt from the Ordinance No. 493 tax by virtue of Section 13 (also known and referred to herein as "§ 831 (1)") of the Tennessee Valley Authority Act (hereinafter "the Act" or the "TVA Act"). The trial court erred, NGEMC contends, when it misconstrued the term "franchise" and therefore concluded that NGEMC's contract

with the TVA is not a franchise for the purposes of § 831 (1).

The proper construction of the word "franchise," as it appears in § 831(1), is a question of first impression in this state, but has been addressed several times the federal courts of the northern district of Alabama[1] and, most recently, by the state court of Alabama in City of Centre, Alabama v. Cherokee Electric Cooperative, Civil Action CV-92-009 (Cherokee, Ala. Cir. Ct. July 23, 1993). In its analysis of the issues presented, the trial court adopted the framework established by the Sixth Circuit in its interpretation of Section 13 of the TVA Act in City of Tullahoma v. Coffee County, 328 F2d 683 (6th Cir. 1964). This process involved examination of the statute itself, the legislative history, the administrative interpretation and the history of Congressional acquiescence in that interpretation. Because we are persuaded by both the logic of the process and the conclusion reached by the trial court we will briefly review each facet of that process.

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[1] See City of Sheffield v. Town of Cherokee, No. 89-AR-5073-NW (N.D. Ala. Oct. 12, 1989); Town of Courtland v. Town of North Courtland, No. 90-L-1346-NE (N.D. Ala. 1990); Cullman Electric Cooperative v. City of Cullman, No. 91-N-665-NE (N.D. Ala. Aug. 30, 1991). See also City of Arab v. Arab Electric Cooperative, No. 92-N-0379-M (N.D. Ala. 1992) (case dismissed on basis of lack of federal jurisdiction).

(a) By plain language, the Act created a "body corporate by the name of the 'Tennessee Valley Authority' (hereinafter referred to as the 'Corporation')." 16 USC § 831. Among its stated purposes are agricultural and industrial development and control of floods in the Tennessee River and Mississippi River Basins. An integral part of the development role is the generation of electricity and the sale of surplus power through both public and private distributors. In order to compensate states in which the TVA had acquired private utilities which had theretofore generated substantial tax revenues to state and local jurisdictions, the Act provided for payments in lieu of these lost taxes to the impacted jurisdictions. In 1940 § 831(l) was amended to accomplish several objectives.[2] That language, as currently codified, and upon which NGEMC relies is as follows:

> The payment herein authorized are in lieu of taxation, and the Corporation, its property, franchises and income, are expressly exempted from taxation in any manner or form by any State, county, municipality, or any subdivision or district thereof.

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[2] June 26, 1940, c. 432, § 39, 54 Stat. 626.

16 USC § 831(1). NGEMC contends that it is a franchise of the TVA and thus exempt, but neither the language of the statute, nor its legislative history supports that contention.

From the earliest history of this country, the term "franchise" has signified a government charter or special privilege conferred on an individual or corporation to do something which it otherwise had no common right to do. Bank of Augusta v. Earle, 38 U.S. 519 (10 LE 274) (1839); McCullough v. Maryland, 17 U.S. (4 Wheat.) 316 (4 LE 579) (1819). Indeed, NGEMC possesses a franchise granted by the State of Georgia by virtue of OCGA § 46-3-170 et seq. TVA's charter and its powers thereunder are "franchises" of the TVA, but while the Act specifically authorizes the TVA to enter into contracts with states, counties, municipalities, corporations, partnerships or individuals for the sale of its surplus electric power (16 USC § 831(i)), the Act does not authorize TVA to grant franchises nor does the word "franchise" appear elsewhere in the Act in any context. Moreover, supply contracts between utilities were not regarded as creating franchises at the time the amending language was adopted. See Griffin v. Oklahoma Natural Gas Corp., 37 F2d 545 (10th Cir. 1930).

(b) As noted by the trial court, the legislative history of § 831(1) leads to the conclusion that cooperatives, such as NGEMC, were never intended by Congress to be exempted from state and local taxation. In hearings before

congressional committees, it was repeatedly stated that the purpose of the language upon which NGEMC relies was to emphasize that TVA (i.e., federally owned) property would remain exempt from state and local taxation, notwithstanding the "in-lieu" payments, while properties not acquired by the TVA, but owned by rural electric cooperatives would remain subject to state and local taxation.[3]

(c) Following the Tullahoma, supra, framework, the trial court next considered the construction accorded the statute by those charged with its administration as a key factor in arriving at its meaning. Relying on the 1944 TVA report to Congress on the amended Section 13,[4] as well as other administrative reports and communications, the trial court found that the TVA has consistently taken a position that the taxation of

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[3] See to Amend the Tennessee Valley Authority Act of 1933: Hearings on H.R. 7424 Before the House Committee on Military Affairs, 76th Cong., 3d Sess. 210 (1940); To Amend Tennessee Valley Authority Act of 1933: Hearings on S. 2925 Before the Subcomm. of the Senate Comm. on Agriculture and Forestry, 76th Cong., 3d Sess. 8 (1940).

[4] Report on Section 13 of the TVA Act, December 22, 1944. The report stated, inter alia that while the electric cooperatives were regarded as a part of the TVA regional power system, the cooperatives are subject to State and local taxation unless specifically exempted. report at 24.

cooperatives is a matter of State and local law. This conclusion was reinforced by reference to the contracts between the TVA and NGEMC. As set forth in the order of the trial court, Section 5 of the 1936 contract between TVA and the promoters of NGEMC required that the

> Promoters (cooperatives) agree to procure . . . all the franchises and consents from the governing bodies of counties and the governing bodies of incorporated towns which may be necessary for the construction and operation . . . of the rural lines herein provided for.

Section 6 of the current contract between TVA and NGEMC is an agreement by NGEMC to use its gross revenues for several enumerated purposes, including the payment of taxes, thus controverting NGEMC's claim that § 831(1) affords its a blanket exemption as a franchise of the TVA.

If Congress has taken issue with the TVA's interpretation of § 831(1), it has not chosen to override that position by amendment to clarify its intent.

2. NGEMC also argues that the trial court's erroneous conclusion that its contractual relationship with the TVA does not render NGEMC a tax-exempt franchise of the TVA ignores the integral role of NGEMC in the performance by TVA of its congressionally mandated functions. NGEMC's role as a so-called

"preference distributor"[5] renders it, according to NGEMC, an instrumentality of the TVA and therefore of the United States government. As such, it contends, NGEMC is shielded from taxation by state and local authorities by the provisions of the Supremacy Clause of the United States Constitution.[6] In support of its argument, NGEMC refers this Court to examples of the contractual control exerted by the TVA over NGEMC as a preference distributor. While we acknowledge that NGEMC's control over key elements of its own operations is heavily circumscribed by various provisions of its contract with the TVA and that electric cooperatives have been held to be instrumentalities of the United States for purposes of exemption from the anti-

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[5] 16 USC § 831(i) provides in part that the TVA is authorized to sell surplus power to States, counties, corporations, etc., to enter into contracts therefor and is directed to give preference in the sale of its surplus power to States, counties, municipalities and "cooperative organizations . . . not organized or doing business for profit . . . . "

[6] U.S. Const., Art. VI, Cl. 2; McCulloch v. Maryland, 17 U.S. 316 supra (absent Congressional consent, the Federal government and its instrumentalities are immune from State taxation under the Supremacy Clause).

trust laws,[7] this Court is not persuaded that NGEMC's right and privilege to distribute electric power purchased by it from the TVA pursuant to that contract renders NGEMC an instrumentality of the federal government exempted from State and local taxation.[8]

3. Irrespective of the determination of its franchise status, NGEMC argues that Ordinance No. 493 violates the uniformity requirements of Art. VII, Sec. I, Par. III of the Georgia Constitution of 1983 because it creates an arbitrary and therefore unreasonable classification upon which it imposes a gross receipts tax, i.e., "(e)ach secondary supplier . . . distributing and selling electric power within the City which is not otherwise paying a franchise fee pursuant to a franchise agreement." (Emphasis supplied.) Ordinance No. 493. In considering NGEMC's contention we note

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[7] Alabama Power Co. v. Alabama Electric Cooperative, 394 F2d 672 (5th Cir. 1968), cert. denied, 393 U.S. 1000 (89 SC 488, 21 LE2d 465) (1968).

[8] See North Ga. EMC v. City of Calhoun, 820 F. Supp. 1403 (N.D. Ga. 1992); aff'd on other grounds North Ga. EMC v. City of Calhoun, 989 F2d 429 (11th Cir. 1993). NGEMC's federal declaratory judgment action was held barred by the Tax Injunction Act (28 USC § 1341); the court stated that it did not regard NGEMC's contract with TVA as rendering NGEMC an instrumentality of the federal government for purposes of the Tax Injunction Act.

preliminarily that it must carry the burden of showing that the tax creates unreasonable classifications. Nat. Linen Svc. Corp. v. Gainesville, 181 Ga. 397 (182 SE 610) (1935). It is without question that the City has the authority, by virtue of its charter, to levy the kind of tax here contested and that the classification of businesses for the purpose of imposing such taxes is largely within the discretion of the taxing authorities, subject only to the requirement that the classification be based on some reasonable ground. Lake Lanier Theatres v. Hall County, 229 Ga. 54 (189 SE2d 439) (1972). Moreover, the power to classify includes the power to subclassify. Wright v. Hirsch, 155 Ga. 229 (116 SE 795) (1922). We agree with the trial court in its determination that Ordinance Nos. 361 and 493 not only may, but should be read together. Having done so, we further agree that in the instant case the City has established a class: secondary suppliers of electricity operating within the City, and two subclasses: those who have entered into franchise agreements (pursuant to Ordinance No. 361) and those who have not (and must remit a gross receipts tax, in the same amount of four percent, pursuant to Ordinance No. 493). A classification based upon the payment of another tax or franchise fee does not render the classification unreasonable. State of Ga. v. Southern Express Co., 133 Ga. 113 (65 SE 282) (1909). Neither does the fact that both classes are currently comprised of one entity invalidate the instant classifications. Wright v. City

of Atlanta, 50 Ga. App. 244 (177 SE 753) (1934). It is only necessary that the subclass be based on "some difference which bears a just and proper relation to the attempted classification." Lake Lanier, supra at 55. The creation, by Ordinance No. 493, of a subclass of secondary suppliers not paying a franchise fee under Ordinance No. 361 cannot be said to be an unreasonable classification when viewed with reference to that subclass of secondary suppliers created by Ordinance No. 361. Accordingly, we hold that Ordinance No. 493 does not violate the uniformity clause of the Georgia Constitution.

Judgment affirmed. All the Justices concur.

Decided November 28, 1994 --

Reconsideration denied December 20 1994.

Franchise fee; constitutional question. Gordon Superior Court. Before Judge Pope.

James C. Brim, Jr., Robert C. Richardson, Jr., Kinney, Kemp, Pickell, Sponcler & Joiner, L. Hugh Kemp, Wagner, Myers & Sanger, Herbert S. Sanger, Jr., for appellant.

Alston & Bird, L. Clifford Adams, Jr., for appellee.

IN THE SUPERIOR COURT

COUNTY OF GORDON

STATE OF GEORGIA

NORTH GEORGIA ELECTRIC MEMBERSHIP CORPORATION,	)	
Plaintiff,	)	CIVIL ACTION FILE
vs.	)	NO. 27616
CITY OF CALHOUN, A Municipal Corporation,	)	ENTERED Jan. 11,1994
Defendant.	)	

SUMMARY JUDGMENT

The above-styled action came on for hearing on cross-motions for Summary Judgment. Both parties are represented by counsel. The Court has considered all the material in the file as well as oral argument. The Court finds as follows:

I.

Can the CITY OF CALHOUN impose a gross receipts tax on NORTH GEORGIA ELECTRIC MEMBERSHIP CORPORATION based on electricity used by customers located in the City?

1.

All material facts are undisputed. The parties virtually agree on the facts.

The issues in the case are questions of law, both State and Federal.

2.

The CITY OF CALHOUN is a political subdivision of the State of Georgia. It derives its authority to act through its charter granted to it by the State of Georgia. (Ga. Laws 1983 at p. 4729). It is empowered to levy business and occupation taxes. These taxes may be levied as a percentage of gross receipts.

3.

NORTH GEORGIA ELECTRIC MEMBERSHIP CORPORATION is a Georgia not-for-profit membership corporation organized and operating under the Georgia Electric Membership Corporation Act., Official Code of Georgia Annotated § 46-3-170 through 46-3-502. Approximately 800 of NGEMC'S members are located within the municipal limits of the CITY OF CALHOUN. Pursuant to a contract for a twenty-year term dated June 20, 1976, all the power which NGEMC distributes is acquired from TVA. Pursuant to O.C.Ga. § 46-3-201(b)(7) the NGEMC is authorized to acquire and dispose of electricity. The NGEMC is not required to buy electricity from TVA.

4.

The Tennessee Valley Authority is "a body Corporate" of the United States. 16 U.S.C.S. § 831. It may contract as authorized by the Tennessee Valley Authority Act, 16 USCS § 831(c)(d), 831(i); § 831(k).

5.

The CITY OF CALHOUN adopted Ordinance No. 493 on October 26, 1992, imposing a four (4) per cent gross receipt tax on NGEMC based on its customers in the CITY OF CALHOUN.

6.

The NGEMC asks for a Declaratory Judgment that the tax is an unlawful violation of 16 USCS § 831(L) and that it violates the Constitution of the State of Georgia in that the tax is arbitrary, unreasonable and discriminatory.

7.

The issues in this case have been extensively briefed and argued and explain the legal issues as seen by each side. The briefs review the TVA Act of 1933 as amended, cases, legislative history, administrative interpretation and application through contracts beginning in 1936.

The controversy revolves around the word "franchises."

The last sentence of the first paragraph of 16 USCS § 831(L) states:

> The payments herein authorized are in lieu of taxation, and the Corporation, its property, franchises, and income, are hereby expressly exempted from taxation in any manner or form by any state, county, municipality, or any

subdivision thereof. (Emphasis Supplied)

The reason for 16 USCS § 831(L) is set out in the briefs. This section is the 1940 amendment to the 1933 Act in which Congress authorized TVA to make payments in lieu of taxes to the states to compensate for property acquired by TVA and removed from state, county and municipal tax digests. NGEMC contends it holds a franchise from TVA or is a TVA franchise that is exempt from taxation under the provisions quoted above.

This Court is of the opinion that NGEMC is a party to and beneficiary of a contract with TVA and not a holder of a franchise as that term is used in 16 USCS § 831(L).

American Bank and Trust Company v. Dallas County, 463 US 855, 77 LEd2d 1072 (1983) states "absent a clearly expressed legislative intention to the contrary, the statutory language must ordinarily be regarded as conclusive". In American Bank v. Dallas County, supra, a case involving state taxation of bank shares comprised of United States securities, the Supreme Court stated:

> "Nothing in the legislative history of the 1959 Amendment to § 3701 contradicts its plain language. Nor is the plain language of the Amendment inconsistent with any other Federal Statute. In these circumstances, the plain language of § 3701 is controlling. American Bank and

Trust Co., v. Dallas County, 463 US 855 at 860; 77 LEd2d 1072 at 1086 (1983)."

This Court makes reference to the American Bank and Trust case only for the principle that the Court should first look to the plain language of the Statute. The Tennessee Valley Authority Statute is controlling and supreme in its intended application. It does not apply to this case.

The TVA Statute states ". . . there is hereby created a body corporate by the name of the "Tennessee Valley Authority" (hereinafter referred to as the "Corporation"). 16 USCS § 831. In the provision under examination the referenced entity is "the Corporation." The phrase is ". . . the Corporation, its property, franchises and income . . . " (Emphasis Supplied) Under the "plain language" analysis, Congress expressly exempted from taxation in any manner TVA's franchises. The Court has read the balance of 16 USCS § 831 to 831(dd) but has not read the word "franchise" again. The Court has found the word "contract" used repeatedly.

In Bank of Augusta vs. Earle, 38 U.S. 519, 10 LEd 274 (1839) Chief Justice Taney delivered an opinion on whether the Bank of Augusta, a Georgia Corporation, could sue in Alabama to collect on a bill of exchange it purchased at discount in Mobile. Earle said the bill was unenforceable because the Bank of Augusta could not exercise the power to purchase a bill of exchange in Alabama. One

argument was that banking in Alabama was a franchise granted by the State of Alabama to State institutions under certain conditions.

Justice Taney stated:

> "It is true that in the case of The State v. Stebbins, I Stewart's Alabama Reports, 312, the court said that since the adoption of their constitution, banking in that State was to be regarded as a franchise. And this case has been much relied on by the defendant in error.
>
> Now, as we are satisfied, from a careful examination of the case, that the word "franchise" was not used, and could not have been used by the Court in the broad sense imputed to it in the argument. For if banking includes the purchase of bills of exchange, and all banking is to be regarded as the exercise of a franchise, the decision of the court would amount to this - that no individual citizen of Alabama could purchase such a bill. For franchises are special privileges conferred by government upon individuals, and which do not belong to the citizens of this country, generally, of common right. It is essential to the character of a franchise that it should be a grant from the sovereign

authority, and in this country no franchise can be held which is not derived from a law of the State.

But it cannot be supposed that the Constitution of Alabama intended to prohibit its merchants and traders from purchasing or selling bills of exchange, and to make it a monopoly in the hands of their banks. And it is evident that the Court of Alabama, in the case of The State v. Stebbins, did not mean to assert such a principle. In the passage relied on they are speaking of a paper circulating currency, and asserting the right of the State to regulate and to limit it."

. . .

The question then recurs - Does the policy of Alabama deny to the corporations of other States the ordinary comity between nations, or does it permit such a corporation to make those contracts which, from their nature and subject matter, are consistent with its policy, and are allowed to individuals? In making such contracts a corporation no doubt exercises its corporate franchise. But it must do this whenever it acts as a corporation, for its existence

is a franchise. Bank of Augusta v. Earle, 38 U.S. 519 at 954, 10 LEd. 274 at 311 (1839).

The judgment of the Circuit Court was reversed and the Bank of Augusta prevailed.

What can be learned from this case about franchises? The State granting of a bank charter was a franchise in the classic sense. The existence of any corporation can be viewed as a franchise since it is a grant from the State. In making contracts a corporation exercises its corporate franchise. But every act it does is not the grant of a franchise. The franchise possessed by NGEMC is granted by the State of Georgia through O.C.GA. § 46-3-170 et seq. TVA exercises its franchise or right to act when it contracts, but it does not grant a franchise. This is because its enabling legislation grants it the power to contract with cooperatives. 16 USCS § 831(i); 831(k).

NGEMC makes the argument that TVA is the United States and it would be absurd to grant itself a franchise. The Code Section itself is superfluous because it is, and was in 1940, clear that a State cannot tax a federal agency. However, it is reasonable to use the word "franchises" in connection with TVA because it was viewed by Congress as a separate "body corporate". In addition, it may have been contemplated that TVA would acquire property and property

rights of other entities possessing state franchises.

It is true that a franchise was a right granted by a sovereign to one to do an act that could not be done of common right.

However, the relationship between NGEMC and TVA is a contractual one. One cannot say that every contract TVA enters into is a franchise. Bank of Augusta vs. Earle recognized this principle.

What does the plan language of the Statute say?

16 USCS § 831(c) provides:

> Except as otherwise specifically provided in this act the corporation . . . (d) may make contracts as herein authorized.

Nowhere in this Statute is TVA authorized to grant franchises.

Under 16 USCS § 831(i):

> The Board is hereby empowered and authorized to sell surplus power not used in its operations and for generation of locks and other works generated by it, to States, counties, municipalities, corporations, partnerships, or individuals, according to the policies hereinafter set forth; and to carry out said authority, the board is authorized to enter into contracts for such sale for a

term not exceeding twenty years, and in the sale of such current by the board it shall give preference to States, counties, municipalities, and cooperative organizations of citizens or farmers, not organized or doing business for profit, but primarily for the purpose of supplying electricity to its own citizens or members.

. . .

Provided further, That the Board is authorized to include in any contract for the sale of power such terms and conditions, including resale rate schedules, and to provide for such rules and regulations as in its judgment may be necessary or desirable for carrying out the purposes of this Act. (16 USCS §§ 831 et seq.), and in case the purchaser shall fail to comply with any such terms and conditions, or violate any such rules and regulations, and contract may provide that it shall be voidable at the election of the Board. (Emphasis Supplied)

. . .

16 USCS § 831k provides:

In order to place the board upon a fair basis for making

such contracts and for receiving bids for the sale of such power, it is hereby expressly authorized, either from appropriations made by Congress or from funds secured from the sale of such power, or from funds secured by the sale of bonds hereafter provided for, to construct, lease, purchase, or authorize the construction of transmission lines within transmission distance from the place where generated, and to interconnect with other systems. The board is also authorized to lease to any person, persons, or corporation the use of any transmission line owned by the government and operated by the board, but no such lease shall be made that in any way interferes with the use of such transmission line by the board: Provided, that if any State, county, municipality, or other public or cooperative organization of citizens or farmers, not organized or doing business for profit, but primarily for the purpose of supplying electricity to its own citizens or members, or any two or more such municipalities or organizations, shall construct or agree to construct and maintain a properly designed and built transmission line to the Government

reservation upon which is located a Government generating plant, or to a main transmission line owned by the Government or leased by the board and under the control of the board, the board is hereby authorized and directed to contract with such State, county, municipality, or other organization, or two or more of them, for the sale of electricity for a term not exceeding thirty years; and in any such case the board shall give to such State, county, municipality, or other organization ample time to fully comply with any local law now in existence or hereafter enacted providing for the necessary legal authority for such State, county, municipality, or other organization to contract with the board for such power: Provided further, that all contracts entered into between the Corporation and any municipality or other political subdivision or cooperative organization shall provide that the electric power shall be sold and distributed to the ultimate consumer without discrimination as between consumers of the same class, and such contract shall be voidable at the election of the board if a discriminatory rate,

rebate, or other special concession is made or given to any consumer or user by the municipality or other political subdivision or cooperative organization: And provided further, that as to any surplus power not so sold as above provided to States, counties, municipalities, or other said organizations, before the board shall sell the same to any person or corporation engaged in the distribution and resale of electricity for profit, it shall require said person or corporation to agree that any resale of such electric power by said person or corporation shall be made to the ultimate consumer of such electric power at prices that shall not exceed a schedule fixed by the board from time to time as reasonable, just, and fair; and in case of any such sale, if an amount is charged the ultimate consumer which is in excess of the price so deemed to be just, reasonable and fair by the board, the contract for such sale between the board and such distributor of electricity shall be voidable at the election of the board: And provided further, that the board is hereby authorized to enter into contracts with other power systems for the mutual exchange of unused excess power

> upon suitable terms, for the conservation of stored water, and as an emergency or breakdown relief. (Emphasis Supplied)

The consistent language of the Statute is that TVA will "contract" with "cooperative organization(s) of citizens or farmers, not organized or doing business for profit."

The NGEMC argues that the statute prohibits discrimination as between consumers of the same class and that this is violated because it charges City of Calhoun consumers an amount for tax. The NGEMC has 71,000 consumers across North Georgia and can budget the tax as legitimate cost of doing business.

8.

City of Centre, Alabama vs. Cherokee Electric Cooperative, Civil Action CV-92-009 Circuit Court of Cherokee County, Alabama, (1993) utilizes in its process of analysis that analysis employed by the Court in City of Tullahoma v. Coffee County, Tennessee, 328 F2d 683 (1964). That Court looked at the statute, legislative history, administrative interpretation and acquiescence by Congress. Further the Court can look at the state and federal cases interpreting the TVA statute and the contracts between these two parties for enlightenment and guidance.

9.

Legislative history is an accepted aid in the interpreting of a federal statute and frequently is determinative

of its meaning. City of Tullahoma vs. Coffee County, 328 F2d 683 (1964). City of Tullahoma decided that the legislative history indicated that how municipal in-lieu of taxation or tax equivalents were distributed was left to State law. The legislative history of 16 USCS § 831(L) regarding state power to tax cooperatives was reviewed in City of Centre v. Cherokee Electric Cooperative Supra. Judge Rains found:

"The Congressional record is replete with evidence that both before and after the above quoted testimony, Congress intended for cooperatives to remain subject to state and local taxation. Testifying before Congress in 1939, William C. Fitts, as then Solicitor of TVA, stated that if there was going to be a tax loss to states and local governments by virtue of municipalities and cooperatives acquiring power distribution facilities, that matter should be left to the state government. He opined that properties that were to be acquired by state agencies, municipalities and cooperatives would be "clearly taxable by the states just as the private utilities were before."[14]

When the bill was introduced, Congressman John Sparkman introduced into

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[14] Hearings on S. 1796 TO AMEND THE TENNESSEE VALLEY AUTHORITY ACT OF 1933, before the House Subcommittee on the Committee on Military Affairs, June 5, 1939, p. 309.

the record a letter from the Chairman of the Board of TVA which stated in part:

> . . . the only subject dealt with in this recommended draft of bill is the Federal Government's contribution on property it owns; the contribution to the State and local subdivisions by municipalities and other public agencies owning their own electric facilities is, of course, not included in these computations nor covered by this proposed bill.[15]

In support of the bill, William C. Fitts, as General Council of TVA, testified before the House Committee as follows:

> . . . the rural distribution lines were sold not to the TVA but to the cities and rural cooperative associations. Now, those properties you are not to be concerned with . . . because the State can tax those properties . . . . They are owned by State agencies and are

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[15] 84 Congressional Record 10601, 10602 (1939).

still subject to State taxation . . . .[16]

Before the Senate Committee one month later Mr. Fitts reemphasized his position on this subject in the following exchange:

> Mr. Fitts . . . . The generating and transmission properties were transferred to the TVA and acquired and held in the name of the United States. So that those properties are not now subject to State taxation, and it is those generating and transmission properties that raise the problem that we are dealing with here. But the distribution properties, which constituted the larger part of the system in value and in taxable value, the distribution properties, which constituted the larger part of the system in value and in taxable value, the distribution properties were transferred either to municipalities or to rural cooperative associations, and are held and operated by them.

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[16] Hearings on H.R. 7424 TO AMEND THE TENNESSEE VALLEY AUTHORITY ACT OF 1933, before the House Committee on Military Affairs, January 23, 1940, pp 209-210.

> Senator Norris. And owned by them.
>
> Mr. Fitts. And owned by them. And of course, they remain subject to State taxation, while the legislation in all of the States does not cover them, the State has the power to levy taxes on those properties and can recover those taxes. So that is not a congressional problem. It is a problem to be solved by the States through their own legislatures.[17]

Immediately following the Senate's agreement to the amendment involving the franchise exemption, Senator George W. Norris of Nebraska explained that the bill involved only the property of the federal government, not the property of municipalities or cooperatives.[18] City of Centre v. Cherokee Electric Corporation, Supra.

10.

Of considerable weight and importance in determining the meaning of a statute is the interpretation given to it by those who are charged with its administration. City of Tullahoma v.

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[17] Hearings on S. 2925 TO AMEND THE TENNESSEE VALLEY AUTHORITY ACT OF 1933, before the Senate Subcommittee of the Committee on Agriculture and Forestry, February 23, 1940, p.8.

[18] 86 Congressional Record, 5239 (1940).

Coffee County, 328 F2d 683 (1964). Congress required in 16 USCS § 831(L) a report from TVA not later than January 1, 1945. This required report was submitted on December 22, 1944. (Exhibit No. 4) This report states at pages 24 and 25:

> "Tax and In-Lieu Payments by Local Distribution Systems
>
> Although recognized as a part of the TVA regional power development, the municipal and cooperative systems which purchase power from the TVA for resale are locally owned. The electric cooperatives are private corporations and are subject to taxation unless specifically exempted. In Alabama 1/ the cooperatives are subject to state and local taxation on a basis comparable with other private business enterprises; in Kentucky and Tennessee 3/ they are subject

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1/ Code of Alabama, 1940, Title 18, Sec. 19.

2/ Kentucky Revised Statutes, 1942, 279.200 and 279.220.

3/ Code of Tennessee, 3708.70 and 3708.128.

> to property and state unemployment compensation taxes only; but in Georgia, 1/ Mississippi, 2/ and North Carolina 3/ the electric cooperatives are entirely exempt from state and local taxes except the state unemployment compensation levy.

At the time of the report the Georgia Constitution provided the tax exemption except for unemployment compensation taxes.

A report of TVA (submitted as an exhibit in this action), dated July 1990, on "TVA Power: Payments in lieu of Taxes - FY 1989)" states at pages 5 and 6:

> Because electric cooperatives are not governmental enterprises, they are generally subject to the same taxes that are applicable to privately owned electric utilities unless expressly treated otherwise by state law. The taxation of

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1/ Constitution of Georgia, Art.7, Sec.2-5002, Para.2. The exemption became effective January 1, 1942.

2/ Mississippi Code, 1942, SEc. 9700. The exemption became effective for the tax year 1938.

3/ Public Laws of North Carolina, 1935, Chap. 291, pp. 313, 317 Public laws of North Carolina, 1941, Chap. 12, pp.9-11, and Chap. 161, pp. 254, 255

> electric cooperatives varies among the Valley states. In Alabama, North Carolina, and Virginia, the cooperatives generally are subject to the state and local taxes applicable to private electric utilities; in Georgia, Kentucky, and Tennessee, they are subject mainly to property taxes; in Mississippi, cooperatives are to a large extent exempt from property taxes, but pay significant other fees and taxes to the state and local governments. On the average, electric cooperatives pay less property tax per dollar of investment (or per dollar of revenue) than private utilities because their properties generally have lower customer densities and less earning capacity, and thus are less valuable, which is reflected in their assessments for ad valorem taxation.

The TVA has consistently maintained since its report in 1944 that the cooperatives remain subject to State taxes. The 1990 report states that the cooperatives are subject to the same taxes that are applicable to privately owned electric utilities.

Exhibits from the TVA Customer Group-Marketing, Rates and Regulator Affairs, Regulatory Studies, Tennessee Valley Authority official files certified by Stephen C. Grace provide further

administrative interpretation. The letter from Southeastern District Manager of TVA, C. Douglas Carver, to General Manager, NGEMC Elvin J. Farrar states the contract between TVA and NGEMC does not prohibit the payment of franchise fees or taxes which may be legally imposed by states or local governments. Mr. Carver recommends negotiating the amount of payments to the City of Varnell.

In a letter from C. Wilson House, District Manager, Office of Power, TVA in a letter of March 11, 1958, to Mr. F.G. Terry, Manager, Mountain Electric Cooperative states:

> If you so desired, we believe you could pay the Town of Elk Park a reasonable consideration for a franchise and such payments would not constitute a special concession or discrimination in favor of a consumer. Some of the cooperatives who distribute TVA power make such franchise or privilege payments. These payments range all the way from a small fixed annual fee to as much, in some cases, as 3 percent of the cooperative's gross receipts within the city limits of the municipality. We are not recommending that you do or do not make a payment for a franchise. We thought you might want to give some thought to this possible solution. Of course, you want to consider its effect on obtaining new

franchises from other municipalities when present franchises expire.

The interpretation of the law by TVA officials indicates that the taxation of cooperatives is a matter of State and local law.

11.

There is no indication that Congress has not acquiesced in the administrative interpretation and application of the law by TVA. No change in statutory language has been enacted since 1940. Congress has received the report of TVA and been informed of its operation.

12.

The Court should consider the agreements and contracts between TVA and NGEMC attached to the affidavit of Ronald O. Hutchins. The first of the agreements between TVA and the promoters of NGEMC was signed in 1936, four years before the Statute at issue. Paragraph 5 on page 3 of the agreement states:

> 5. Promoters agree to procure, in the name of Promoters of Corporation (except in Catoosa County, where franchises shall be secured in the name of Authority,) all the franchises and consents from the governing bodies of counties and the governing bodies of incorporated towns which may be necessary for the construction and operation by Authority or Corporation of the rural lines

> herein provided for. If possible these franchises and consents shall be secured in such form as will permit their assignment by Promoters to Corporation without the necessity for approval of such assignments by said Courts and governing bodies.

This initial agreement recognized the need to obtain consent from local governments even before NGEMC was incorporated. Municipalities have routinely charged fees to private utility companies for these rights. (It may be that franchises acquired under promoter agreements, such as in Catoosa County, are encompassed in the word "franchises" in 16 USCS § 831(L), but none have been mentioned in the briefs).

The 1936 contract did not mention payment of taxes in paragraph 8(a) dealing with disbursements of revenue.

In paragraph 6 of the 1967 contract it provided for payment of taxes. Paragraph 5, Resale Rates, in subparagraph (c) provides that if the rates provided in the resale schedules do not produce revenues sufficient to provide for the operation of the electric system on a sound basis, the parties will put into effect such charges as will provide increased revenues necessary. As stated earlier, TVA does not interpret this contract to prevent the payment of franchise fees. The contracts do not say EMC agrees not to pay state or local taxes.

Indeed the NGEMC pays some ad valorem property tax on a small amount of property. It agrees it should pay ad valorem property tax but not a business tax based on gross receipts. If it were consistent in its argument it would have to say it is not subject to taxation at all. Having conceded it is liable for ad valorem property taxes then it follows that it is liable for other taxes.

The Statute provides that municipalities may include in their rates an amount to cover tax equivalent payments to the municipality. There is no such provision concerning cooperatives. This is reasonable since from the inception the Tennessee Valley Authority considered the cooperatives to be taxable as a private supplier. This placed the municipality on the same basis as the cooperatives. If this provision had not been added the municipalities would have been limited in its revenue to the rate schedule without an element for taxation. If a cooperative operated in the City the City could tax the cooperative for which the cooperative could add taxes as a legitimate expense under paragraph 6.

The Plaintiffs rely on several federal decisions dealing with this issue. When this case appeared earlier this Court decided not to rule on this issue out of respect for the federal decisions. Now the Court is called upon to rule and must do so as it understands the law.

The primary case relied on by Plaintiffs is City of Sheffield v. Town of Cherokee, (Civil Action No. 89-AR-5073-NW: N.D. Ala. (1989)). The Town of Cherokee sought to obtain a license fee from the City of Sheffield based on Sheffield's distribution of electricity in Cherokee. Sheffield contracted to receive its power at wholesale rates from TVA. This case is not applicable to the facts under consideration because there is a vast difference between municipal distributors and cooperative distributors. The TVA Act, 16 USCS § 831(L), sets out a statutory plan for dealing with "tax equivalent" payments by a municipality to itself. No such statutory plan exists for cooperatives. This may be because it was contemplated that cooperatives would be taxed like private utility companies. The U.S. District Court in Sheffield notes and all must agree that a distributor of TVA electricity must not be operated for profit. No surplus can be distributed to members and no revenue can be accumulated. If revenue exceeds lawful expenditures then the rate structure is to be renegotiated to eliminate the surplus. To say a distributor must not be operated for a profit may be relevant for Alabama State law reasons, but is only a truism in the case at hand. In Sheffield the Court considered in footnote 6 the difficulty of distinguishing between "tax equivalent payments" and "profit" in the context of a municipal distributor. This case does not involve that problem because a municipal distributor is not involved. A

tax assessed by a city, like the City of Calhoun, is not "profit". The imposition of a tax does not deprive NGEMC of "profit". It cannot have a profit as explained above. The imposition of the tax is a cost or expense allowed in the TVA-EMC contract.

With regard to the Sheffield Case analysis of the word "franchise", that Court recognizes that the contract does not contain the term. The TVA Statute uses it only once. The word contract is used numerous times. The Court refers to "long-standing usage" of the term. Counsel in extensive briefs to this Court has not revealed the "long-standing usage." Reference is made to Bank of Augusta v. Earle Supra. This Court has carefully read that case and sees a distinction between being created by grant of a franchise and acting by contract. Indeed, TVA is authorized to "contract" in 16 USCS § 831c but not to issue "franchises". In any event, a municipal distributor with its specific statutory "tax-equivalent" scheme is not involved here. Apparently the Town of Courtland v. Town of North Courtland, Civil Action 90-L-1346-NE N.D. Ala. (1990) is based on the fact a municipal distributor must operate on a not-for-profit basis not producing revenue. Again, that case involves a municipal distributor unlike the case at hand. The Court would point out, however, that there is a difference between revenue and profit.

Plaintiffs cite Cullman Electric Cooperative vs. City of Cullman, (CV91-N-

665-NE N.D. Ala. (1991)). This is an action involving a cooperative and not a municipality. The case was decided before the defendant filed a brief. The Court quickly accepted City of Sheffield v. Town of Cherokee as dispositive. No explanation of the application to a cooperative is given.

This Court respectfully disagrees with the opinion that a contract with a cooperative is a grant of a federal franchise in light of the fact that the Congress did not vest TVA with that authority. The NGEMC franchise was granted by the State of Georgia by charter from the Secretary of State.

Tennessee Valley Authority v. ERC of Kentucky, Civil Action No. 79-0009-P W.A.Ky. (1979), is not applicable here. TVA is not a party to this litigation. Further, the City of Calhoun is not attempting to regulate the rate structure or schedule of the contracts between TVA and cooperatives. The contracts between TVA and NGEMC allows for the payment of taxes. There is no argument that NGEMC is unable to absorb the gross receipts tax under the revenue produced by the present contract.

The Plaintiffs argue this case as if TVA were a party which it is not.

14.

It is argued that TVA was established to further federal social and economic goals and this is true and undisputed. Federal law is the supreme law of the land and Georgia State law must bow to

it. However, this federal law 16 USCS § 831(L) does not require it. Judge Acker in Sheffield, Supra on page 8 states a rock bottom concern when he writes:

> "To allow Cherokee to tax the sale of the TVA-supplied power would thwart Congress' purpose in allowing TVA to sell its excess electricity to municipalities and in providing consumers with economical sources of power. Moreover, Cherokee's tax is unrelated to the tax equivalent payment Sheffield receives from TVA. Other municipalities and Colbert County could enact similar taxes and, if the taxes are burdensome, effectually tax the operation out of business, leaving Colbert County without an economical source of electricity" City of Sheffield vs. Town of Cherokee, Supra.

Basically, the power to tax is the power to destroy. This is a serious concern. However, Congress could easily amend 16 USCS § 831 and state that the cooperatives are not to be taxed and set up a tax-equivalent payment plan similar to that of the municipalities. Congress has not said that the cooperatives are not to be taxed. The taxing authority of a State should not be diminished by implication. A state or local government cannot exist but by taxation. If a private corporation receiving its charter from a state cannot be taxed by that

state the prohibition should be clear and not vague and not founded on a definition of "franchise" that is "far from clear."

15.

This Court declares that the City of Calhoun is not prevented by 16 USCS § 831(L) from imposing a gross receipts tax on the Plaintiff under Ordinance 493.

II.

Does Calhoun Ordinance No. 493 violate Article VII, Section I, Paragraph III of the Georgia Constitution?

1.

Article VII, Section I, Paragraph III of the Georgia Constitution provides:

> (a) All taxes should be levied and collected under general laws and for public purposes only . . .
>
> (A)ll taxation shall be uniform upon the same class of subjects within the territorial limits of the authority levying the tax.

2.

On September 28, 1987, the City of Calhoun adopted two ordinances dealing with secondary suppliers of electricity within the City of Calhoun. These ordinances, 360 and 361 sought to impose a fee or tax of four percent of the utilities gross sales in the City in lieu of all occupation, license, excise and special franchise taxes. Ordinance 361 was directed to NGEMC. Ordinance 360 is

directed to Georgia Power Company. Georgia Power Company and NGEMC are the only two secondary suppliers in the City of Calhoun. The City, itself, is the primary supplier.

3.

NGEMC refused to pay the fee or tax under Ordinance 361. The City filed suit to collect the tax or fee. This Court ruled that the Ordinance 361 was invalid because it sought to impose a contract in a way ruled invalid in City of LaGrange v. Troup County EMC, 200 Ga. App. 458. This ruling was affirmed in City of Calhoun, v. North Georgia Electric Membership Corp., 209 Ga. App. 547 (1993).

On October 26, 1992, the City adopted Ordinance Number 493 which imposes a gross receipts business tax of four (4%) per cent on all gross revenues of each secondary electric supplier, including EMC's, from revenues derived from the sale of electricity to customers in the city and the supplier is not otherwise paying a franchise fee.

NGEMC contends that this Ordinance 493 abridges Article VII, Section I, Paragraph III of the Georgia Constitution of 1983. As both briefs recognize, in determining whether an occupation tax complies with the uniformity clause the taxing entity may not arbitrarily control the inclusion or exclusion of certain groups of people from the operation of the tax. A classification may be made, but it must be reasonable, and not arbitrary. The legislative body imposing

the tax has a great deal of freedom to classify and subclassify for the purpose of taxation. This discretion is not unlimited. Wright v. Hirsch, 155 Ga. 229 (1922), Lake Lanier Trustees v. Hall County, 229 Ga. 54 (1972). Some cases indicate the classification must be "natural". The only requirement with respect to classification is that the classification must be based on some reasonable ground. The classification must be based on some difference which bears a just and proper relation to the attempted classification. Lake Lanier Trustees v. Hall County, 229 Ga. 45 (1972). It is plain that the right to classify business and occupation taxes for the purpose of imposing a license tax upon them lies largely within the discretion of the legislative body imposing the tax, and that in the absence of a clear showing of an abuse of that discretion, the Courts ought not to interfere with its exercise. Lake Lanier Trustees v. Hall County, Infra.

This Court is of the opinion that there has not been a clear showing of the abuse of discretion by the City warranting the Court in interfering with its exercise.

The two Ordinances 390 and 493 should be read together. State of Georgia v. Southern Express Company, 133 Ga. 113 (1909). Head v. Cigarette Sales Company, 188 Ga. 452 (1939).

Reading both ordinances together the same rate of tax is applied to all secondary suppliers of electricity with

customers in the City. Ordinance 493 does not force a supplier to enter into an agreement with the City. Whether a secondary supplier does or does not enter into an agreement it pays the same rate of tax as all other similarly situated. It would be arbitrary to Georgia Power to require it to pay a 4% gross receipts tax and not treat NGEMC the same.

Occupation, franchise, use, excise or business taxes have been utilized by governments for years. e.g., Georgia v. Southern Express Co., 133 Ga. 113 (1909). It cannot be argued that such a tax in any form by a city is invalid. Here it is argued that the tax is not applied uniformly. If Ordinance 493 were not enacted as complementary to Ordinance 390 then Ordinance 390 would violate uniformity.

Plaintiff relies upon United Cigar Stores Co., v. Stewart, 144 Ga. 724 (1915) where a state tax on coupons given away with purchases of tobacco were to be taxed. The Court applied the principles enunciated herein and decided that the tax did not apply to all person trading in redeemable coupons.

In this case the two ordinances taken together apply to all secondary suppliers of electricity with customers in the City of Calhoun.

4.

The Court enters its judgment that Ordinance 493 is not invalid for the reasons given.

(a) The Defendant's Motion for Summary Judgment is hereby granted. The Plaintiff's Motion for Summary Judgment is hereby denied. (b) The Order enjoining the collection of the 4% gross receipts tax from the Plaintiff is dissolved and the Plaintiff is ordered to remit the funds maintained by Plaintiff in a reserve account to Defendant. The Court will hold in abeyance subparagraph (b) of this order for 10 days to allow the Plaintiff an opportunity to file motions appurtenant to seeking further review of this order.

This 11th day of January, 1994.

/s/

TOM POPE, JUDGE SUPERIOR COURT, CHEROKEE JUDICIAL CIRCUIT

SUPREME COURT OF GEORGIA

Case No. S94A1009

Atlanta, December 20, 1994

The Honorable Supreme Court met pursuant to adjournment. The following order was passed:

NORTH GEORGIA ELECTRIC MEMBERSHIP CORPORATION V. CITY OF C GEORGIA

Upon consideration of the Motion for Reconsideration filed in this case, it is ordered that it be hereby denied.

SUPREME COURT OF THE STATE OF GEORGIA

Clerk's Office, Atlanta

I hereby certify that the above is a true extract from the minutes of the Supreme Court of Georgia.

Witness my signature and the seal of said court hereto affixed the day and year last above written.

Sherie M. Welch, Clerk

16 United States Code § 831l

Financial assistance to States and local governments in lieu of taxation; apportionment; limitation on contracts for sale of power to municipalities; report to Congress

In order to render financial assistance to those States and local governments in which the power operations of the Corporation are carried on and in which the Corporation has acquired properties previously subject to State and local taxation, the board is authorized and directed to pay to said States, and the counties therein, for each fiscal year, beginning July 1, 1940, the following percentages of the gross proceeds derived from the sale of power by the Corporation for the preceding fiscal year as hereinafter provided, together with such additional amounts as may be payable pursuant to the provisions hereinafter set forth, said payments to constitute a charge against the power operations of the Corporation: For the fiscal year (beginning July 1) 1940, 10 per centum; 1941, 9 per centum; 1942, 8 per centum; 1943, 7 1/2 per centum; 1944, 7 per centum; 1945, 6 1/2 per centum; 1946, 6 per centum; 1947, 5 1/2 per centum; 1948 and each fiscal year thereafter, 5 per centum. "Gross proceeds", as used in this section, is defined as the total gross proceeds derived by the Corporation from the sale of power for the preceding fiscal year, excluding power used by the Corporation or sold or delivered to any other department or agency of the Government of

the United States for any purpose other than the resale thereof. The payments herein authorized are in lieu of taxation, and the Corporation, its property, franchises and income, are expressly exempted from taxation in any manner or form by any State, county, municipality, or any subdivision or district thereof.

The payment for each fiscal year shall be apportioned among said States in the following manner: One-half of said payment shall be apportioned by paying to each State the percentage thereof which the gross proceeds of the power sales by the Corporation within said State during the preceding fiscal year bears to the total gross proceeds from all power sales by the Corporation during the preceding fiscal year; the remaining one-half of said payment shall be apportioned by paying to each State the percentage thereof which the book value of the power property held by the Corporation within said State at the end of the preceding fiscal year bears to the total book value of all such property held by the Corporation on the same date. The book value of power property shall include that portion of the investment allocated or estimated to be allocable to power: Provided, That the minimum annual payment to each State (including payments to counties therein) shall not be less than an amount equal to the two-year average of the State and local ad valorem property taxes levied against power property purchased and operated by the Corporation in said State and against

that portion of reservoir lands related to dams constructed by or on behalf of the United States Government and held or operated by the Corporation and allocated or estimated to be allocable to power. The said two-year average shall be calculated for the last two tax years during which said property was privately owned and operated or said land was privately owned: Provided further, That the minimum annual payment to each State in which the Corporation owns and operates power property (including payments to counties therein) shall not be less than $10,000 in any case; Provided further, That the corporation shall pay directly to the respective counties the two-year average of county ad valorem property taxes (including taxes levied by taxing districts within the respective counties) upon power property and reservoir lands allocable to power, determined as above provided, and all payments to any such county within a State shall be deducted from the payment otherwise due to such State under the provisions of this section. The determination of the board of the amounts due hereunder to the respective States and counties shall be final.

The payments above provided shall in each case be made to the State or county in equal monthly installments beginning not later than July 31, 1940.

Nothing herein shall be construed to limit the authority of the Corporation in its contracts for the sale of power to municipalities, to permit or provide for the resale of power at rates which may

include an amount to cover tax-equivalent payments to the municipality in lieu of State, county, and municipal taxes upon any distribution system or property owned by the municipality, or any agency thereof, conditioned upon a proper distribution by the municipality of any amounts collected by it in lieu of State or county taxes upon any such distribution system or property; it being the intention of Congress that either the municipality or the State in which the municipality is situated shall provide for the proper distribution to the State and county of any portion of tax equivalent so collected by the municipality in lieu of State or county taxes upon any such distribution system or property.

The Corporation shall, not later than January 1, 1945, submit to the Congress a report on the operation of the provisions of this section, including a statement of the distribution to the various States and counties hereunder; the effect of the operation of the provisions of this section on State and local finances; an appraisal of the benefits of the program of the Corporation to the States and counties receiving payments hereunder, and the effect of such benefits in increasing taxable values within such States and counties; and such other date, information, and recommendations as may be pertinent to future legislation.

(May 18, 1933, c. 32, § 13, 48 Stat. 66; June 26, 1940, c. 432, § 39, 54 Stat. 626.)

16 United States Code § 831i

Sale of surplus power; preferences; experimental work; acquisition of existing electric facilities

The Board is empowered and authorized to sell the surplus power not used in its operations, and for operations of locks and other works generated by it, to States, counties, municipalities, corporations, partnerships, or individuals, according to the policies hereinafter set forth; and to carry out said authority, the Board is authorized to enter into contracts for such sale for a term not exceeding twenty years, and in the sale of such current by the Board it shall give preference to States, counties, municipalities, and cooperative organizations of citizens or farmers, not organized or doing business for profit, but primarily for the purpose of supplying electricity to its own citizens or members: Provided, That all contracts made with private companies or individuals for the sale of power, which power is to be resold for a profit, shall contain a provision authorizing the Board to cancel said contract upon five years' notice in writing, if the Board needs said power to supply the demands of States, counties, or municipalities. In order to promote and encourage the fullest possible use of electric light and power on farms within reasonable distance of any of its transmission lines the Board in its discretion shall have power to construct transmission lines to farms and small villages that are not otherwise supplied with electricity at

reasonable rates, and to make such rules and regulations governing such sale and distribution of such electric power as in its judgment may be just and equitable: Profited further, That the Board is authorized and directed to make studies, experiments, and determinations to promote the wider and better use of electric power for agricultural and domestic use, or for small or local industries, and it may cooperate with State governments, or their subdivisions or agencies, with educational or research institutions, and with cooperatives or other organizations, in the application of electric power to the fuller and better balanced development of the resources of the region: Provided further, That the Board is authorized to include in any contract for the sale of power such terms and conditions, including resale rate schedules, and to provide for such rules and regulations as in its judgment may be necessary or desirable for carrying out the purposes of this chapter, and in case the purchaser shall fail to comply with any such terms and conditions, or violate any such rules and regulations, said contract may provide that it shall be voidable at the election of the Board: Provided further, That in order to supply farms and small villages with electric power directly as contemplated by this section, the Board in its discretion shall have power to acquire existing electric facilities used in serving such farms and small villages: And provided further, That the terms "States", "counties", and "municipalities" as used in this chapter

shall be construed to include the public agencies of any of them unless the context requires a different construction.

(May 18, 1933, c. 32, § 10, 48 Stat. 64; Aug. 31, 1935, c. 836, § 6, 49 Stat. 1076.)

16 United States Code § 831j

Equitable distribution of surplus power among States and municipalities; improvement in production of fertilizer

It is declared to be the policy of the Government so far as practical to distribute and sell the surplus power generated at Muscle Shoals equitably among the States, counties, and municipalities within transmission distance. This policy is further declared to be that the projects herein provided for shall be considered primarily as for the benefit of the people of the section as a whole and particularly the domestic and rural consumers to whom the power can economically be made available, and accordingly that sale to and use by industry shall be a secondary purpose, to be utilized principally to secure a sufficiently high load factor and revenue returns which will permit domestic and rural use at the lowest possible rates and in such manner as to encourage increased domestic and rural use of electricity. It is further declared to be the policy of the Government to utilize the Muscle Shoals properties so far as may be necessary to improve, increase, and cheapen the production of fertilizer and fertilizer ingredients by carrying out the provisions of this chapter.

(May 18, 1933, c. 32, § 11, 48 Stat. 64.)

STATE OF GEORGIA,
COUNTY OF GORDON, ORDINANCE NO. 493
CITY OF CALHOUN.

AN ORDINANCE TO LEVY AND COLLECT A GROSS RECEIPTS BUSINESS TAXES UPON SECONDARY ELECTRIC SUPPLIERS DISTRIBUTING AND SELLING ELECTRIC POWER SYSTEM WITHIN THE CORPORATE LIMITS OF THE CITY WHICH HAVE NOT ENTERED INTO A FRANCHISE AGREEMENT; TO REPEAL CONFLICTING ORDINANCES; TO PROVIDE FOR SEVERABILITY; TO FIX AN EFFECTIVE DATE; AND FOR OTHER PURPOSES.

THE MAYOR AND COUNCIL OF THE CITY OF CALHOUN HEREBY ORDAINS, AS FOLLOWS:

SECTION ONE:

That the Code of Ordinances, City of Calhoun, Georgia, is hereby amended by adding a new article to Chapter 12. "Occupational Licenses, Taxes and Regulations" to be numbered V and to be designated as "Secondary Electric Suppliers" and to be comprised of four (4) new sections to be numbered §§ 12-170, 12-171, 12-172, and 12-173 which said new article and sections of said article to read as follows:

ARTICLE V. SECONDARY ELECTRIC SUPPLIERS

Sec. 12-170. Gross receipts business tax established; verified statement of revenues to be filed.

Each secondary electric supplier (including specifically Electric Membership Corporations whether or not operated for profit), within the meaning

of O.C.G.A. § 46-3-1, et seq., distributing and selling electric power within the city which is not otherwise paying a franchise fee pursuant to a franchise agreement, and whether or not said secondary electric supplier has, operates and maintains offices within the city shall pay a gross receipts tax at the rate of four (4) per cent on any and all gross revenue derived from distribution and sale of electric power to their customers, members, or purchasers within the city, according to the verified statement of said gross revenues which shall be submitted by said secondary electric supplier at the time said taxes are paid. This gross receipts business tax is levied pursuant to authority granted the city in Ga. L. 1983, p. 4710, at p. 4729, Sec. 5-103.

Sec. 12-171. Taxes payable monthly; taxes to be in lieu of certain other taxes.

The taxes hereinbefore set out in this article, shall be due and payable to the city on the twentieth day of each month, calculated on gross revenues billed for the immediately preceding month; also, the percentage of said gross revenues hereinbefore prescribed to be collected shall be in lieu of all other license and business or occupation taxes, but shall not at any time be considered to interfere with, or in any way prevent the collection of ad valorem taxes upon the property of said secondary electric supplier in the same manner as all other

property, real and personal, in the city is taxed.

Sec. 12-172. Electric service within the city.

Secondary electric suppliers distributing and selling electric power within the city, and which do not have a franchise agreement with the city, do not acquire any additional rights by the payment of the tax herein levied under this article other than those rights granted under the Georgia Electric Territorial Service Act.

Sec. 12-173. Enforcement and Administration.

(a) The city clerk shall be responsible for the administration and enforcement of this article, and shall have the power to prepare and provide the necessary forms and for the collection of the tax herein levied.

(b) The city clerk shall issue executions for the collection of all outstanding and unpaid taxes imposed and assessed by this article. The unpaid taxes and executions shall be collected in the manner provided by law for the collection of other taxes due the city.

SECTION TWO. If any clause, sentence, paragraph, section or part of this Ordinance shall be adjudged by a court of competent jurisdiction to be invalid for any reason, such judgment shall not affect, impair or invalidate the remainder.

SECTION THREE. All ordinances of parts of ordinance in conflict herewith are hereby expressly repealed.

SECTION FOUR. The effective date of this Ordinance shall be November 1, 1992, and taxes levied herein shall begin to accrue on November 1, 1992.

The above and foregoing Ordinance was duly passed, adopted and approved at the regular meeting of the Mayor and Council of the City of Calhoun, Georgia held on the 26 day of October, 1992.

APPROVED:

/s/

HON. JOHN D. MEADOWS, III, MAYOR
CITY OF CALHOUN, GEORGIA

ATTEST: /s/
MRS. CATHY HARRISON,
CLERK/TREASURER
CITY OF CALHOUN, GEORGIA

First Reading: September 28, 1992

Public Hearing (If Applicable):
October 26, 1992

Second Reading: October 26, 1992

If Applicable: Third Reading: N/A
Fourth Reading: N/A

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
NORTHWESTERN DIVISION

CITY OF SHEFFIELD, ALABAMA,	)	
Plaintiff,	)	CIVIL ACTION NO.
vs.	)	
	)	89-AR-5073-NW
TOWN OF CHEROKEE, ALABAMA,	)	ENTERED
	)	Oct. 12, 1989
Defendant.	)	

MEMORANDUM OPINION

The court has for consideration cross-motions for summary judgment filed by the plaintiff, City of Sheffield, Alabama (Sheffield), and by the defendant, Town of Cherokee, Alabama (Cherokee). Both parties concede that the case can be decided under Rule 56, F.R.Civ.P.

Pertinent Undisputed Facts

The parties are municipal corporations and are located in Colbert County, Alabama. On March 15, 1976, Sheffield entered into a power distribution contract with the Tennessee Valley Authority (TVA). Federal law gives TVA the authority to enter into such contracts with municipalities. Pursuant to the contract, Sheffield buys electricity from TVA at a wholesale rate

and resells the electricity at a rate established by TVA. Sheffield is not allowed under the contract to profit from the resale of the electricity. In other words, the contract between TVA and Sheffield explicitly provides that Sheffield cannot operate its electricity distribution system (herein "operation") in such a way as to raise revenue for the general benefit of Sheffield.

While the contract does not allow Sheffield to profit from the operation, Sheffield may retain certain funds received "in lieu of taxes."[1] The funds from the electrical distribution operation are to be kept separate from other Sheffield funds. With one very relevant exception, the contract provides that Sheffield may not use the gross revenue of the operation except to cover operating expenses, to make payments on operation-related interest and principal payments, and to retain working capital for contingencies and a reasonable number of weeks. All of the aforementioned options for using operation revenue refer to use of the revenue for purposes related to the operation. If Sheffield still has revenue from the operation

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[1] The terms "tax equivalent payments" and "payments 'in lieu of tax'" will be used interchangeably for obvious reasons. The payments from TVA are equivalent to the tax that could be levied but are paid on the understanding that such a tax will not be levied. As will become clear, TVA makes these payments to state, county, and municipal governments for different purposes.

after amounts have been allocated to purposes related to the operation, it may transfer a "tax equivalent payment" into its general fund. All revenue remaining in the operation's account after the "tax equivalent payment" has been made is surplus and may require wholesale rate reductions to deplete the surplus.

The tax equivalent payments are defined in an addendum to the TVA-Sheffield contract entitled "Schedule of Terms and Conditions". As a result of operating an electric distribution system for TVA, and if funds remain in the operation's account, Sheffield "may take each year from the electric system, in lieu of taxes, an amount representing the fair share of the cost of government properly to be borne that year by its electric system, not to exceed a maximum amount . . . calculated by applying the prevailing municipal, county and State property tax rates to the depreciated original cost of tangible property used in electric operations within the respective taxing jurisdictions at the beginning of each tax year." In other words, the amount taxable on operation property by Alabama, Colbert County, Sheffield and any other municipality in which operation property is situated limits Sheffield's tax equivalent payment. By accepting tax equivalent payments, Sheffield gives up the right to impose taxes "upon the property or operations of its electric system, or upon the sale, purchase, use or consumption of electric energy supplied thereby." Moreover, "(i)t shall be the

responsibility of (Sheffield) to provide for such distribution as may be required by law or as it deems appropriate under the provisions of Section 13 of the TVA Act to the State, counties and any other municipal corporations in which it operates of any tax equivalents so collected by (Sheffield) in lieu of State, county and other municipal taxes."

Sheffield sells TVA-supplied electricity to areas in Colbert County that are not within its municipal jurisdiction. Cherokee is one area in which Sheffield sells this electricity. In 1973, Cherokee officials passed an ordinance, levying a privilege or license tax on entities "engaged in the business of operating power companies or other public utilities" of three percent (3%) of gross receipts on business done in Cherokee and of one and one half percent (1.5%) of gross receipts on business done in Cherokee's police jurisdiction. The tax lay dormant for fifteen years. In September 1988, Cherokee filed an action in state court against Sheffield for $100,000.00 allegedly due because of the 1973 tax. Sheffield filed this action, seeking a declaration that both federal and state law disallow the tax which Cherokee asserts in the state court action and seeking an injunction against Cherokee's collection from Sheffield of the tax.

Conclusions of Law

Celotex Corp. v. Catrett, 477 U.S. 317, 106 S.Ct. 2548 (1986), provides the standard by which this court measures a motion for summary judgment. The "party seeking summary judgment always bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of 'the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any,' which it believes demonstrate the absence of a genuine issue of material fact." Id., 106 S.Ct. at 2553. Then, the opposing party must go beyond the pleadings to demonstrate that the record contains a material fact in dispute. Id. Because each party filed a summary judgment motion, each bears identical burdens. Each party agrees that the facts are not disputed and that this cause turns upon a pure question of law, namely, whether a municipality may levy a tax against another municipal corporation which operates an electric operation on a non-profit basis pursuant to the TVA Act.

Before looking into the merits, the court severely scrutinized its jurisdiction over the cause. The Declaratory Judgment Act, 28 U.S.C. § 2201, does not extend the jurisdiction of federal courts but merely provides another federal remedy. Franchise Tax Bd. v. Const. Laborers Vac. Trust, 463 U.S. 1, 103 S.Ct. 2840 (1983). However, Sheffield squarely confronts the court with a question "arising under" federal

law. Sheffield asks the court to determine, in addition to a claim based on state law, whether 16 U.S.C. § 8311 bars the tax that Cherokee seeks to impose on Sheffield. Consequently, the court has jurisdiction based on 28 U.S.C. § 1331.

The instant case is very similar to City of Tullahoma v. Coffee County, Tennessee, 328 F.2d 683 (6th Cir. 1964). City of Tullahoma was a declaratory judgment action filed by a city that obtained electric power from TVA under contract, seeking a declaration of its rights under the contract concerning the distribution of "in lieu of taxes" payments into the city's general fund. Coffee County sought the amount that Tullahoma retained based on "an amount calculated by applying the county property tax rate to the depreciated cost of tangible property used in electric operations." Id. at 685. The Sixth Circuit examined the legislative history of the TVA Act in general, and the section at issue here in particular, and determined that federal law does not mandate nor determine the rights to distribution of tax equivalent payments.[2]

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[2] Senator Lister Hill of Alabama offered the amendment to the TVA Act which the court held only made "clear that the amendment of Section 13 (16 U.S.C. § 8311) as to payments of tax equivalents by TVA to states and counties should not be construed to impair or interfere with TVA's

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Id. at 687. Congress, according to the Sixth Circuit, felt that, as a matter of federalism, it could not legislate the distribution of the tax equivalent payments, but, as Senator Norris noted, "the States could provide by statute that when any municipality received anything in lieu of taxation, it should be subdivided just the same as though it was (sic) taxes . . ." Id. at 689 (citing Hearing on S. 2925 Before a Subcommittee of the Senate Committee on Agriculture and Forestry, Cong., 3d Sess. 33 (1940)). The Sixth Circuit concluded that the TVA Act did not authorize the district court's declaration that Tullahoma must pay a portion of the tax equivalent payments to the county. Id. at 687. Rather, the matter was a state concern to be addressed by state legislation.[3]

While the instant case is similar to City of Tullahoma, the cases are not

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existing authority under Section 10 to permit or provide for such tax equivalent payments by municipalities." Id. at 688-9. Further, John H. Lapsley, counsel for the State Revenue Department of Alabama and a representative of the Governor of Alabama, suggested the amendment and testified in Congress in favor of it.

[3] See Ky. Stat. Ann. § 96.570(12) (1942) (authorizing a municipality that has contracted with TVA to distribute electricity to also acquire a franchise to distribute the electricity to other municipalities or counties).

identical. Cherokee, rather than demanding its portion, if any, of the tax equivalent payments that TVA made to Sheffield's general fund imposed a tax on Sheffield's distribution of electricity within Cherokee's jurisdiction. Unlike in City of Tullahoma where the TVA Act did not provide a rule regarding distribution of tax equivalent payments, the Act does provide an answer here. The TVA Act, 16 U.S.C. § 831l, provides for a second type of "in lieu of tax" payments made by TVA to state and local governments[4], but that provision, as

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[4] Alabama statutory law provides for the further distribution of payments made by TVA to the State. See Ala. Code § 40-28-1 et seq. Sheffield argues that these Alabama provisions prohibit Cherokee's tax. However, there are two types of tax equivalent payments. First, TVA provides tax equivalent payments to municipalities with which it contracts to distribute electricity. Second, TVA provides tax equivalent payments to state and local governments in which TVA sells electricity. The Alabama statutory provisions only address the distribution of payments made to the State.

The TVA-Sheffield contract recognizes that state law may require Sheffield to distribute the tax equivalent payment it receives directly from TVA. Even though Alabama senators proposed the amendment recognizing TVA's authority to make "in lieu of tax" payments to municipalities when contracting to distribute electricity, and a

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noted in City of Tullahoma, does not affect TVA's power to provide "in lieu of tax" payments in its electricity distribution contracts. More importantly, the payments authorized in § 831l are "in lieu of tax". In other words, "(TVA), its property, franchises and income, are expressly exempted from taxation in any manner or form by any State, county, municipality, or any subdivision or district thereof." 16 U.S.C. § 831l (1940). Because TVA makes these tax equivalent payments to governments in whose jurisdiction TVA carries on its power operations, certain aspects of the TVA operation are exempt from state and local taxation.

The validity of Cherokee's tax, then, would appear to depend upon whether the contract between TVA and Sheffield constitutes a "franchise" for purposes of § 831l. The matter is far from clear. The contract itself nowhere mentions a franchise.[5] Nor does the TVA Act define

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representative of the Governor and Department of Revenue suggested and testified in Congress about the law, Alabama still has no law concerning the distribution of tax equivalent payments made by TVA directly to municipalities.

[5] An addendum to the contract entitled "Schedule of Terms and Conditions" does recognize that Sheffield may be required to pay a fee in order to receive a franchise to distribute electricity in other municipalities.

the term "franchise". However, based on long standing usage of the term and the purpose of the TVA Act, the court finds that Sheffield received a franchise from TVA and that revenue from that franchise is exempt from Cherokee's tax. Long before the term became used in distributorship relationships, a "franchise" was known as a special privilege conferred upon individuals or corporations by governmental authority to do something that could not be done of common right. Bank of Augusta v. Earle, 38 U.S. 519 (1838). Here, TVA, an agency of the United States (See 16 U.S.C. § 831 et seq.), conferred upon Sheffield the ability to receive TVA's excess electricity at a wholesale rate and to distribute it to the benefit of consumers.

The purpose of the TVA Act and its provision of tax equivalent payments supports the decision that proceeds of the TVA-Sheffield contract are exempt from Cherokee's tax. Congress intended TVA to distribute power to consumers at the lowest possible cost to the consumer. See 16 U.S.C. § 831i (1935) (expressing a Congressional preference for distribution of excess electricity to organizations not engaged in distribution for profit). TVA includes the tax equivalent payments in its electricity distribution contracts to prevent higher charges for electricity because of municipal taxes; in order to receive the payments, Sheffield cannot tax the sale of the electricity. To allow Cherokee to tax the sale of the TVA-supplied power would thwart Congress'

purpose in allowing TVA to sell its excess electricity to municipalities and in providing consumers with economical sources of power. Moreover, Cherokee's tax is unrelated to the tax equivalent payment Sheffield receives from TVA. Other municipalities and Colbert County could enact similar taxes and, if the taxes are burdensome, effectively tax the operation out of business, leaving Colbert County without an economical source of electricity.

The basic dispute presented is one not resolved by the law applicable to the complaint. Basically, Cherokee wants to receive a portion of the tax equivalent payments made by TVA to Sheffield. The TVA Act, however, prevents the imposition of a tax "in any manner" upon the operation that Cherokee seeks to tax. Therefore, the method chosen by Cherokee to recover a portion of the payments is invalid. Because Sheffield is contractually bound to operate its facility at a zero profit margin, hence not making revenue, the conclusion that Cherokee may not tax Sheffield's electric operation would be the same under Alabama law.[6] Nothing in

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[6] Cherokee argues that Alabama law allows one municipality to tax another if the latter is engaged in a proprietary function. Town of Mulga v. Town of Maytown, 502 So. 2d 731 (Ala. 1987). Sheffield does not distribute electricity for profit. It if does reap profits from its TVA

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this opinion, however, should be construed as an opinion of the court on whether Sheffield may be forced to distribute the tax equivalent payments it receives directly from TVA by some method other than taxation.

For the foregoing reasons, summary judgment in favor of Sheffield and against Cherokee is due to be granted.

An appropriate, separate order will be entered.

DONE this 12th day of October, 1989.

/s/

WILLIAM M. ACKER, JR.
UNITED STATES DISTRICT JUDGE

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contract, then Sheffield is in breach. The distinction between "tax equivalent payments" and "profit" may be a legal fiction, but, if so, it is a legal fiction that this court must recognize and apply. Alabama law only allows the taxation of a municipality's proprietary function if the municipality is engaged in the function to raise revenue. Id. at 734. Therefore, Alabama law would also preclude the collection of Cherokee's tax from Sheffield.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ALABAMA
NORTHEASTERN DIVISION

THE CULLMAN ELECTRIC COOPERATIVE	)	
Plaintiff,	)	CV-91-N-665-NE
vs.	)	
CITY OF CULLMAN, ALABAMA, a Municipal Corporation,	)	ENTERED Aug. 30, 1991
Defendant.	)	

MEMORANDUM OF OPINION

This is an action for declaratory judgment involving a federal question under the Tennessee Valley Authority Act of 1933, 16 U.S.C. § 831, et seq. hereinafter, the "TVA Act") and the United States Constitution. 28 U.S.C. § 2201(a), 28 U.S.C. § 1331, 18 U.S.C. § 831, et seq.

The focus of the Cullman Electric Cooperative's (hereinafter, "Cullman Electric") complaint are two taxes imposed by the City of Cullman (hereinafter, "the City") on certain gross receipts of Cullman Electric. The City imposes a three percent (3%) tax on Cullman Electric's gross receipts within the City's municipal limits, and a one and one-half percent (1 1/2%) tax on Cullman Electric's gross receipts outside the City municipal limits buts within the

City's "police jurisdiction." Cullman Electric claims the taxes are prohibited by the TVA Act and by the supremacy clause of the United States Constitution, U.S. Const. art. VI, cl. 2.

Plaintiff has set out in brief the following facts, which are undisputed by the defendant:

1. Cullman Electric is an Alabama not-for-profit membership cooperative organized and operating under the Alabama Electric Cooperative Act, Ala. Code §§ 37-6-1 to 37-6-29 (1975); it is forbidden by TVA pursuant to the contract between TVA and Cullman Electric dated July 1, 1976 from making a profit. (Affidavit of Steve Foshee).

2. Cullman Electric distributes electric power to approximately 32,000 members in Cullman, Winston, Morgan and Lawrence Counties of Alabama. Id.

3. Approximately 300 of Cullman Electric's members are located within the municipal limits of the City, and approximately 3,000 of its members are located outside the municipal limits of the City but within the police jurisdiction of the City. Id.

4. Pursuant to the contract with TVA, all of the power which Cullman Electric distributes is acquired from TVA. Id.

5. Since 1936, when Cullman Electric was organized to provide electrical service to Cullman County, Alabama, under the regional power program then being established by TVA, Cullman Electric has

acquired all of its power from TVA pursuant to long-term contracts. Id.

6. By the terms of the contract, TVA sets the rates that Cullman Electric may charge, and TVA exercises control over, inter alia, the uses that Cullman Electric may make of the revenue derived from power distribution, the rules and regulations applied by Cullman Electric to its members, the method of accounting for the finances of Cullman Electric, and the standards as to quality of service provided by Cullman Electric. Id.

7. The terms of the contract impose upon Cullman Electric an obligation to act in accordance with the TVA Act. Specifically, Cullman Electric must operate on a non-profit basis and for the benefit of all of the consumers of electricity served with TVA electric power. Id.

8. On August 10, 1970, the City adopted Subsections 248 and 249 of the City's Ordinance No. 493. Through Subsection 248, the City purports to impose a tax on Cullman Electric, and through Subsection 249, the City purports to impose a police jurisdiction tax upon Cullman Electric. Id.

9. Cullman Electric has refused to pay the taxes. Id.

10. The City filed a civil action against Cullman Electric in 1974, seeking a declaratory judgment that the police jurisdiction tax was valid and lawful and a valid, lawful exercise of the City's police power pursuant to Alabama Code,

Title 37, Section 733 (1940). The state court granted summary judgment for the City, declaring the police jurisdiction tax to be "valid and lawful under the provisions of Title 37, Section 733, Code of Alabama, 1940, as amended." Id., Exhibit B. Subsequently, the parties agreed that the City would not collect the police jurisdiction tax for the period October 16, 1970 through October 16, 1985. Id., Exhibit B.

11. On January 23, 1989, the City filed a civil action in the Circuit Court of Cullman County, Alabama, asking for a declaratory judgment that the city tax is valid and lawful under Ala. Code § 11-15-90 (1975), and a "reaffirmation" that the police jurisdiction tax is valid under Ala. Code § 11-15-91 (1975). Id. That action is pending in the state court.

The cause is presently before the court on plaintiff's motion for summary judgment. Defendant was given an opportunity to respond to the motion, but instead of responding, defendant filed a "motion in opposition" to plaintiff's motion for summary judgment shortly after the date its response was due, stating that it would submit a brief in support of the motion later that week. When the brief was not forthcoming, the court gave the defendant an additional opportunity to submit a response, but the defendant again failed to make any written submission. The defendant's second opportunity to respond passed by over one month ago, and the court has not received any response. The Court

considers the motion to be ripe and ready for submission.[1]

I. The TVA Act.

16 U.S.C. § 831l provides, in pertinent part:

> In order to render financial assistance to those States and local governments in which the power operations of the (TVA) are carried on and in which the (TVA) has acquired properties previously subject to State and local taxation, the board (of directors of TVA) is authorized and directed to pay to said States, and the counties therein, for each fiscal year, beginning on July 1, 1940, the following percentages of the gross proceeds derived from the sale of power by (TVA) for the preceding fiscal year as hereinafter provided, together with such additional amounts as may be payable pursuant to the provisions hereinafter set forth, said payments to constitute a charge against the power operations of the (TVA) ... "Gross proceeds," as used in this section, is defined as the total gross proceeds

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[1] After the draft of this opinion was substantially complete, defendant submitted its response. The Court has read the brief, and it does not change the decision rendered herein.

> derived by the (TVA) from the sale of power for the preceding fiscal year ... the payments herein authorized are in lieu of taxation, and the (TVA), its property, franchises and income, are hereby expressly exempted from taxation in any manner or form by any State, county, municipality, or any subdivision or district thereof.

16 U.S.C. § 831l.[2] This Court agrees with Judges Acker and Lynne that nonprofit distributors of TVA power, such as Cullman Electric, are TVA franchises and, therefore, exempt from local taxation pursuant to Section 831l. Courtland v. Town of North Courtland, 90-L-1346-NE;

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[2] The Court notes that Alabama has adopted a plan for distributing TVA payments made in lieu of taxes, and pursuant to that plan, the state divides the monies it receives from TVA among, inter alia, counties served by TVA. Ala. Code § 40-28-2. Pursuant to that plan, any country receiving a share of the TVA payments "that has within its boundaries a municipality or part thereof that is served in whole or in part by TVA shall share in the county's payments with said municipality receiving the same amount as the ratio of TVA served population of the municipality bears to the TVA served population of the entire county" where the legislative has not made other distribution plans. Ala. Code § 48-28-3. Therefore, under Alabama law the City of Cullman must share in the TVA payments received by Cullman County.

City of Sheffield v. Town of Cherokee, 89-AR-5073-NW.

> Long before the term became used in distributorship relationships, a "franchise" was known as a special privilege conferred upon individuals or corporations by governmental authority to do something that could not be done of common right . . . . Here, TVA, an agency of the United States (See 18 U.S.C. § 831 et seq.), conferred upon Sheffield the ability to receive TVA's excess electricity at a wholesale rate and to distribute it to the benefit of its customers.

City of Sheffield, supra, at p. 8 (citations omitted).[3]

II. The Agreement with the City.

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[3] In its belated brief, defendant relies on City of Tullahoma v. Coffee County, Tennessee, 328 F.2d 683 (6th Cir. 1964). That case involved payments under paragraph 4 of Section 831l from TVA to a municipality for distribution. The Tullahoma court held that federal law did not require that the municipality distribute the payments. The case has no application here, since there is no allegation that TVA is making such payments to the City. Furthermore, the issue is not how to distribute TVA "in lieu of tax" monies, but whether the City may tax a non-profit distributor of TVA energy.

In its opposition to Cullman Electric's motion for summary judgment, the City claims Cullman Electric is not prohibited from entering into a contract or agreement with the City. Without deciding that question, the court concludes the City has presented no evidence that Cullman Electric entered into an agreement with the City to pay the taxes at issue here.

As noted above, after the City was successful in obtaining a state court judgment declaring that the police jurisdiction tax was valid under Alabama law, the parties entered into a negotiated agreement. The City does not explain what relevance the agreement has here, but presumably the City contends that Cullman Electric agreed to pay the taxes in question. The agreement on which the City relies was memorialized in four letters and a 1977 sale and purchase agreement.[4] First, on November 12, 1975, Cecil Romine, the president of the Cullman City Council, wrote to Dwight Webb of Cullman Electric, acknowledging that Cullman Electric had requested that the City waive the police jurisdiction license tax arrearage. Mr. Romine counter-proposed that Cullman Electric sell to the City "all existing customers within the corporate limits of the City of Cullman to the Cullman Power Board

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[4] These documents are attached to the City's June 18, 1991 motion.

..." in return for the City's waiver of the five year tax arrearage.

Mr. Claude Wood, manager of Cullman Electric, responded to Mr. Romine's proposal on January 28, 1976. He said that Cullman Electric and TVA agreed to sell the customers to the Cullman Power Board, provided that the City, in addition to waiving the tax arrearage, would also agree that the City would not "impose or collect the gross receipts city license tax in its police jurisdiction for the next ten (10) years." On March 5, 1976, James Berry and City Mayor W.J. Nesmith accepted Mr. Wood's proposal on behalf of the City. On March 15, 1977, the sale and purchase agreement was signed.

It is evident from these documents that Cullman Electric never agreed to pay the City taxes; it merely agreed to sell its customers within the city limits in return for the City's agreement to waive the tax arrearage and to not "impose or collect the license tax . . . in it's (sic) police jurisdiction for the next ten years." (Letter of James Berry). Since there was no agreement to pay the taxes, the court need not decide if Cullman Electric could agree to pay taxes to the City despite Section 831l. 16 U.S.C. § 831l.[5]

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[5] The City also submitted evidence tending to show Cullman Electric pays taxes to other

(footnote continued on next page)

III. Collateral Estoppel and Res Judicata.

The City also claimed this action is barred by the doctrines of res judicata and collateral estoppel.

In the 1975 action for declaratory judgment, the City claimed, and the state court declared, that the City's police jurisdiction tax was valid under Alabama law. Collateral estoppel clearly does not apply to preclude this action, since the issue before this court, whether the City's taxes are valid under federal law, was never litigated in the state court. See Empire Fire & Marine Ins. Co. v. J. Transport, 880 F.2d 1291, 1295 (11th Cir. 1989). Neither is res judicata applicable here, since the earlier action in state court was a declaratory judgment action. Although res judicata ordinarily provides that a judgment, once rendered, is the full measure of relief between the same parties on the same "claim" or "cause of action," when the earlier action is a declaratory judgment, the principles of res judicata are not applied automatically. Id., at 1296. The supplemental nature of declaratory relief requires that preclusive effect

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(footnote continued from previous page)

municipalities. The legality of those tax payments is not before this Court. Evidence that Cullman Electric pays taxes imposed by other municipalities has no bearing on the question of whether the City's taxes are valid.

can only be given to relitigation of any issue actually litigated and necessary to the judgment rendered. Id. Therefore, since the parties did not actually litigate the validity of the City taxes under federal law, the litigation is not precluded by the doctrine of res judicata.

IV. Abstention.

Defendant also claims the Court should abstain from exercising its jurisdiction due to pending state court proceedings. The only evidence in the record regarding the pending state court proceeding is in the affidavit of Steve Foshee. Mr. Foshee stated:

> As of January 23, 1989, City filed a civil action against Cullman Electric in Cullman County, Alabama, Circuit Court, Case No. CV-88-5081, asking for a declaratory judgment that the City Tax is valid and lawful under Ala. Code § 11-15-90 (1975), for a reaffirmation that the Police Jurisdiction Tax is valid and lawful under Ala. Code § 11-15-91 (1975), and for a determination of any amount due.

Affidavit of Steve Foshee, p. 8. "'The doctrine of abstention, under which a District Court may decline to exercise or postpone the exercise of its jurisdiction, is an extraordinary and narrow exception to the duty of a

District Court to adjudicate a controversy properly before it.'" Colorado River Water Conservation District v. United States, 424 U.S. 800, 96 S. Ct. 1236, 47 L.Ed.2d 483 (1976); Southern Ry. Co. v. State Bd. of Equalization, 715 F.2d 522, 526 (11th Cir. 1983). This court is not considering a federal constitutional issue which might be mooted or presented in a different posture in the state court proceeding. Colorado River, 424 U.S. at 814, Railroad Comm'n of Texas v. Pullman Co., 312 U.S. 496, 85 L.Ed. 971, 61 S. Ct. 643 (1941). Nor will the resolution of the issue here require this court to decide difficult questions of state law bearing on policy problems of substantial public import whose importance transcends the result in the case at bar. Colorado River, 424 U.S. at 814. This court is not called upon to review a question of state law which might impair efforts to implement state policy. Id. at 815. Finally, there is no question before this court regarding the restraint of the state proceedings. Id. at 816. In exceptional circumstances, dismissal of a federal suit may be appropriate due to the presence of an ongoing state proceeding for reasons of wise judicial administration. Id. at 817. This is not such a case. A decision in the state court proceedings would resolve only the question of whether the City's taxes are valid under state law, not the question before this court. A decision in state court will not obviate the need for this court to address the question of whether the City's taxes are valid under federal

law, and this action is therefore not duplicitous. There is no reason for this Court to abstain from exercising its jurisdiction.[6]

In accord with the above, the plaintiff's motion for summary judgment will be granted. A separate order will be entered.

Done, this 30th of March, 1991.

/s/

EDWIN L. NELSON
UNITED STATES
DISTRICT JUDGE

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[6] Cullman Electric's alternative argument, that TVA is an agency and instrumentality of the United States performing wholly governmental functions, and therefore exempt from regulation or control of any state or local statute under the Supremacy Clause of the United States Constitution, U.S. Const. art. VI, cl. 2, will not be addressed in light of this result. The court notes that, although TVA may enjoy the protection of the supremacy clause, it is not so clear that TVA franchises fall within the coverage of the clause.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
NORTHEASTERN DIVISION

TOWN OF COURTLAND, ALABAMA,	)	
Plaintiff,	)	CIVIL ACTION
vs.	)	
	)	CV 90-L-1346-NE
TOWN OF NORTH COURTLAND, ALABAMA,	)	ENTERED Dec. 28, 1990
Defendant.	)	

ORDER OF DISMISSAL

This cause, coming on to be heard, was submitted upon motion of the Town of Courtland for summary judgment and the stipulation of the parties filed herein.

Because the Town of Courtland is contractually bound to operate its facility at a zero profit margin, hence not producing revenue, the Court concludes that North Courtland may not impose a tax on the Town of Courtland's electric operation. The Court is persuaded by the rationale of City of Sheffield, Ala. v. Town of Cherokee, Ala., Civil Action 89-AR-5073-NE (Oct. 12, 1989).

It is accordingly ORDERED, ADJUDGED and DECREED by the Court that defendant, Town of North Courtland, Alabama, may not recover of plaintiff, Town of Courtland, Alabama, the license tax involved herein, and that this action be and the same is hereby dismissed.

DONE this 28th day of December, 1990.

/s/

SEYBOURN H. LYNNE,
SENIOR JUDGE

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